Supreme Court, U. S.
FILED
JUL 9 1974
MICHAEL RODAK, JR., CLERK

73-7031

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPRIME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered on April 10, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 285 N.C. , 203 S.E.2d 803 (1974) and is set out in Appendix A hereto, pp. 1a-13a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of North Carolina was entered on April 10, 1974 and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States ?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina:

> § 14-17. Murder in the first and second degree defined; punishment.- A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison. 1/

1/ As construed in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

> § 15-187. Death by administration of lethal gas.- Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.
>
> § 15-188. Manner and place of execution.- The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of North Carolina, entered on April 10, 1974, affirming petitioner's conviction and death sentence. Petitioner, Jesse Thurman Fowler, a black man, was sentenced to die on September 27, 1973, in the Wake County Superior Court of North Carolina upon conviction for the first degree murder of an acquaintance, Mr. John Griffin. 2/

2/ Petitioner's sentence of death was imposed under N.C. Gen. Stat. §14-17, as construed by the Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973). The North Carolina Legislature enacted a statute, S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974) on April 8, 1974 which imposes the death penalty for first degree murder, but this statute provides that it is applicable to offenses committed after its ratification.

The State's evidence showed that petitioner and John Griffin had been drinking and throwing dice at Sylvester Jones' house on the morning of July 1, 1973. Jones briefly left the game, and asked petitioner to watch his ten dollar bill. When Jones returned, the money was gone, and he testified that petitioner told John Griffin to return the money to Jones, which Griffin did. Later that afternoon, at the King's Lounge, Jones heard Griffin tell petitioner that "if he pulled that shit like he pulled this morning, that he was going to kick his ass." R. 59. Petitioner "told him he wasn't going to do nothing to him," id., but Griffin invited him outside, and a fight ensued in which Griffin hit petitioner in the face, bloodying and breaking his nose, kneed him in the face, and pummelled him as he lay on the ground. After Jones broke up the fight, petitioner left, and Jones testified that "Griffin came up to me then and asked me for my pistol. He knew that I had a pistol. At the time, I did not have it on me. So I told him . . . I couldn't do that." R. 60.

Shortly after 8:00 p.m. on July 1, 1973, Mrs. Mary Raines was conversing with John Griffin and his two daughters in front of her dwelling at 1300 Branch Street in the Walnut Terrace area of Raleigh, North Carolina, when a car with two men in it drove up. Mrs. Raines heard Griffin say to a man in the car, "I am tired of you all bugging me," R. 17, after which the car drove away and he returned to Mrs. Raines and the children. A few minutes later, a man ran up from the direction in which the car had gone and fired two shots at Griffin, but Mrs. Raines

was not able to identify the gunman. The driver of this car, Johnny Frazier Dolby, testified that he had given petitioner a ride in the early evening of July 1 and that petitioner, who had been drinking some, explained his bloody shirt by stating that he had been in a fight with John Griffin. When the two men chanced upon Griffin at 1300 Branch Street, Griffin told petitioner, "I don't want to fight you no more. I want you to go on home." R. 24. Petitioner said nothing, and Dolby drove away, only to be told to stop by petitioner after driving a short distance. Petitioner got out of the car and went back toward Branch Street.

Another acquaintance of petitioner's, Charles McCoy, testified that as he was walking to his home on Branch Street at about dusk on July 1, he heard Griffin declare to petitioner and another man in a car: "Take him on before I make him use what he has in his pocket." R. 35. A few minutes later, McCoy noticed petitioner walking along Branch Street from the direction the car had driven away. He testified that "I think [petitioner] stopped [Griffin's daughter] and asked where was John [Griffin]." R. 31. McCoy, who was walking toward petitioner, felt someone bump him from behind and saw that Griffin was standing or crouching behind him. He then observed petitioner step to the side and fire a pistol twice at Griffin. McCoy, who sustained powder burns on his left hand, saw petitioner walk away, as Griffin stumbled down the embankment to the apartments below.

Griffin's eleven year old daughter, Janice, testified:

> "I saw my father hiding behind McCoy . . . . My father was walking behind him, crouched down . . . . I saw my father get behind Mr. McCoy when Jesse [petitioner] came out of the car . . . . My father got behind McCoy and started tipping [tip-toeing?] behind him . . . . My father tipped behind McCoy about two car lengths. McCoy was walking very slowly."

R. 49-50. Griffin's nine year old daugher, Paula, testified that a few minutes before the shooting, petitioner met her on Branch Street, and asked her where her father was. She replied that she didn't know. R. 51. Both girls testified that they saw petitioner shoot Griffin. R. 48-50, R. 50-52. In a statement given to the Raleigh police at 2:20 a.m., July 2, petitioner said that he had been drinking heavily on the day of the shooting, and that after the fight at the King's Lounge, he had gone to Walnut Terrace in a car driven by Ronald Dolby to see a friend when he happened upon John Griffin once more. Griffin wanted to fight again, but petitioner asked Dolby to let him out of the car so Dolby "would not get into any trouble." R. 45. When Griffin "came after him," petitioner "turned and shot at him and missed. I then shot at him again and hit him. I dropped the gun and walked away." Ibid.

Sylvester Jones testified that he found out in the late evening of July 1 that John Griffin had been killed and that he went to see petitioner, who admitted the shooting, and stated that "he wanted to turn himself in, but in a way, he was kind of scared." R. 62. Jones accompanied petitioner to the police station where petitioner made a statement to the police concerning the shooting.

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Jones stated that Griffin "got into a lot of arguments" and "liked to talk a whole lot. He would shoot a lot of bull." R. 63 Dolby testified that "Some folks say that [Griffin] will knock you in the head if you turn your back" and that when Griffin was drinking, he had a "big mouth." R. 28.

Petitioner presented nine witnesses in his defense and also testified at some length himself. Two witnesses testified that they had planned to go fishing with petitioner on July 1, and that it was their usual practice to carry pistols to protect themselves against snakes. R. 53-54, 57-58. One of the witnesses to the fight between petitioner and John Griffin outside the King's Lounge, Charles Gene Rogers, heard Griffin ask for a pistol after the fight. R. 69. Rogers told petitioner, "Man, you better go ahead on because John Griffin is trying to get a pistol to kill you." R. 69-70. Rogers testified that he had known Griffin "a pretty good while":

> "He had a lot of fights and a lot of arguments. Well, I would say he could cause some danger, he had a big mouth ....I know that he always runs off at the mouth and continues to get whopped a lot by his mouth."

3/ R. 70.

3/ Petitioner testified that his sister-in-law lived in Walnut Terrace, and that he went to her house in that area on the evening of July 1. As he and Dolby were driving on Branch Street, Griffin flagged the car down, snatched the car door open, and began "running off at the mouth about 'I don't want to fight you no more. So why don't you go on home.'" R. 87. Dolby drove away and offered to drive petitioner home, but in order to allow Dolby to return home sooner, petitioner got out of the car after it had gone a few blocks. Petitioner saw Griffin crouching behind Charles McCoy and moving towards him:

> "John [Griffin] was headed directly down the street toward where I was standing. So I put my hand in my pocket and he pushed Charles McCoy in the back and I pulled my gun out of my pocket and I shot it one time. I kind of

At the conclusion of the testimony, the court instructed the jury that it could return a verdict of not guilty, guilty of involuntary manslaughter, guilty of second degree murder, or guilty of first degree murder. R. 102-103. The jury found petitioner guilty of first degree murder, and the court thereupon sentenced him to die.

3/ cont'd.

> shot it up like in the air. I was not trying to hit anybody. I was hoping that, you know, he was turning backward.
>
> Before I fired I saw John crouched behind McCoy for a couple of seconds or so. Charles was still between me and John. Then that is when John pushed McCoy and said, 'Nigger, I am going to make you use what you have got in your pocket.'
>
> That is when I pulled my gun out and shot hoping he would turn around and go back. So he didn't turn. Looked like he was running faster toward me and that is when I put the gun down like this and shot him. When I shot the second time, I was as far from him as from here to that Officer. After I shot the gun, I presumed it hit him. I didn't know because he turned around and looked like he started running back down the street. I put my gun down by my side and walked across the street here."

R. 84. Petitioner said that he fired because "I thought he was going to do something to me," and because "I heard that he was trying to get a gun."R.85.

On April 10, 1974, the Supreme Court of North Carolina affirmed petitioner's conviction and sentence of death, with three Justices dissenting in regard to the death penalty. On April 17, 1974, Chief Justice William A. Bobbitt of the North Carolina Supreme Court stayed execution of the judgment in order to allow a petition for certiorari to be filed in this Court.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner's Grouping of Exceptions and Assignments of Error (R. 127-131) in the Record on Appeal assigned the death sentence in this case as error because:

> "The imposition and carrying out of the death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19 and 24, of the Constitution of the State of North Carolina."

Assignment of Error No. 9, R. 131. The Supreme Court of North Carolina rejected this contention on the merits, citing its prior decisions in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973) and State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).[4/] 202 S.E.2d at 815 (App. A at 13a).

4/ A dissenting opinion stated: "Chief Justice Bobbitt and Justice Higgins and Justice Sharp, dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in State v. Jarrette, 284 N.C. 625, 666, 202 S.E.2d 721, 744 (1974)." 203 S.E.2d at 815 (App. A at 13a).

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REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In order to avoid burdening the Court with lengthy and repetitious matter, petitioner adopts the "Reasons for Granting the Writ" section of the Petition for Certiorari to the Supreme Court of North Carolina, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at pp. 11-51, and each of the issues set forth there:

(A) Whether the decision of the North Carolina Supreme Court reinstating the death penalty in that State following Furman v. Georgia, 408 U.S. 238 (1972), is an impermissible evasion of the Furman holding;

(B) Whether such a reinstatement of the death penalty by judicial decision violates the Eighth and Fourteenth Amendment commands of lawfulness in criminal punishments;

(C) Whether the perpetuation of arbitrary sentencing discretion in North Carolina's administration of the death penalty following Furman violates the constitutional rule of that case;

(D) Whether the death penalty is so inconsistent with contemporary standards of decency as to violate the Eighth and Fourteenth Amendments.

Since the Dillard certiorari petition was filed on June 11, 1974, 18 additional persons have been sentenced to die in this country, making a national total of 121 defendants presently condemned to death as a result of a sentence imposed subsequent to the date of the Furman decision. In North Carolina, 12 additional persons have been sentenced to die under the procedures approved in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), making a total of 41 persons now under sentence of death in North Carolina. 5/

5/ The following death sentences should be added to those listed in footnote 28, pp. 29-31, of the Dillard petition: State v. [illegible], Cumberland County Superior Ct., No. 73-Cr-30529, 73-Cr-30615 (May 16, 1974); State v. Gordon, Mecklenburg County Superior Ct., No. 73-Cr-56187, 73-Cr-56188 (May 29, 1974); State v. Robbins, Guilford County Superior Ct., No. 74-Cr-19674, 74-Cr-19771 (May 31, 1974); State v. Thompson, Rutherford County Superior Ct., No. 74-Cr-1222 (June 1, 1974); State v. Braswell, Caswell County Superior Ct., No. 73-Cr-1439 (June 7, 1974); State v. Rozell Hunt, Anson County Superior Ct., No. 74-Cr-1538 (June 13, 1974); State v. Lowery, Alamance County Superior Ct., No. 73-Cr-8718 (June 13, 1974); State v. Simmons, Nash County Superior Ct., No. 74-Cr-194 (June 13, 1974); State v. Fernando Hunt, Vance County Superior Ct., No. 74-Cr-550, 74-Cr-551, 74-Cr-552 (June 14, 1974); State v. Davis, Lenoir County Superior Ct., No. 74-Cr-1102, 74-Cr-1103 (June 16, 1974); State v. Foster, Lenoir County Superior Ct., No. 74-Cr-1248, 74-Cr-1249 (June 16, 1974); State v. Strickland, Onslow County Superior Ct., No. 74-Cr-3671, 74-Cr-3672, 74-Cr-10568 (June 29, 1974).

Since June 11, 1974, the Supreme Court of North Carolina has vacated death sentences in State v. Anthony Carey, __N.C.___, __S.E.2d __, North Carolina Supreme Court No. 16 (Mecklenburg) (July 1, 1974), and in State v. Albert Carey, __N.C.__, __S.E.2d __, North Carolina Supreme Court No. 19 (Mecklenburg) (July 1, 1974), and has remanded these cases for new trials.

There is sometimes a delay between imposition of a sentence of death and commitment of the condemned prisoner to Death Row in Central Prison, Raleigh, North Carolina. This delay accounts for the fact that some of the sentences listed [illegible] were imposed before June 11, 1974, the date the Dillard petition was filed.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX A

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N.C. 801

death penalty did not constitute cruel and unusual punishment.

No error.

Bobbitt, C. J., Higgins and Sharp, JJ., dissented from imposition of death penalty.

1. Criminal Law ⇔1078

Assignments of error not brought forward and argued in defendant's brief were deemed abandoned on appeal. Supreme Court Rule [illegible].

2. Criminal Law ⇔769(4)

Records ⇔Death

When record is void of any proof of objection to charge given by the court at the close of presentation of evidence, there was no evidence of improper charge to the jury, and there was no evidence of improper [illegible] for [illegible] an exception by [illegible] of appellant, there was no evidence of [illegible] proceedings [illegible] the [illegible] law in [illegible].

3. Criminal Law ⇔727, 729(1)

In [illegible] quired to give [illegible] but only a [illegible] law in [illegible] Solicitor [illegible] ancies to be called to [illegible] at [illegible] time, otherwise they are deemed to be waived and will not be considered on appeal.

4. Criminal Law ⇔1122

Recapitulation of evidence given to court to jury was in substantial accordance with requirement to be made presumptively to prejudice of defendant, and in absence of showing by defendant that the court's summary included there was no prejudice.

5. Criminal Law ⇔829(3), 1171

Trial court's summation of evidence regarding State's contentions as to [illegible]

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self-defense was amply supported by State's evidence and was not given in such manner that jury could reasonably infer that statement was court's opinion, if defendant had any objection he should have stated it at the time.

6. Criminal Law ⇐772(3)

Trial court's statement in charge to jury as to defendant's contention was not subject to objection that it gave unequal stress to contentions of State.

7. Criminal Law ⇐1056(2)

Exceptions to charge were insufficient to present question of failure to grant request for instruction not part of charge to which exceptions were taken, but part of charge to which exceptions were taken was not full statement of defendant's contentions and was not clear statement of law arising thereon.

8. [illegible]

[illegible] evidence in the [illegible] was error for [illegible] to the effect [illegible] from evidence [illegible] was not [illegible] was [illegible] and were [illegible] a reasonable doubt [illegible] charged.

9. Criminal Law ⇐1154

Verdict will not be set aside on appeal because of error in charge but where specific error is assigned as ground of appeal, it must be considered in connection with charge as a whole.

10. Homicide ⇐29

If person who is to death at time he committed homicide should be [illegible] utterly incapable of [illegible] and proceeded and purpose to kill, [illegible] ment of first-degree murder is absent and the offense is reduced to murder in the second degree.

11. Homicide ⇐293(2)

Although there was testimony that defendant had been drinking, there was insufficient evidence of intoxication by defendant, where only defense was self-defense, so as to require an instruction on intoxication as a defense to charge of murder in the first degree.

12. Jury ⇐131

If prospective juror states that under no circumstances could he vote for verdict that would result in imposition of death penalty, challenge for cause and examination of evidence thereon, but court can properly dismiss juror on challenge for cause.

13. Jury ⇐131(5)

It is permissible to ask prospective juror if he has beliefs or conscientious scruples that would affect his ability to render impartial verdict based solely upon evidence and law as given by court, but juror may not be asked whether he would automatically vote against imposition of capital punishment.

14. Jury ⇐131

State has challenge for cause any juror who would automatically vote against verdict that would require imposition of death penalty without regard to evidence that could be developed at trial of case or who has fixed opinion against imposition of death penalty that would prevent him from making an impartial decision as to defendant's guilt in a capital case.

15. Jury ⇐133, 142

"Peremptory challenges" are challenges that may be made according to the judgment of party entitled thereto and reason for peremptory challenge cannot be required into.

16. Criminal Law ⇐1101(1)

It is primary duty of defense counsel to prepare and docket a true and complete transcript of record for appeal in criminal

case and if it contains errors of omission it is the responsibility of solicitor to file exceptions or cross-case. G.S. § 1-282, 15-180.

17. Jury ⇐142

If defense counsel desires to take exception to action of court in excusing prospective juror he should either have case a stipulation with State setting out matter the reason for excusing juror or should include transcript of voir dire examination as to that juror in case on appeal.

18. Criminal Law ⇐1172(2)

Defendant appealing from [illegible] case on appeal [illegible] by cross of failure of [illegible] transcript of voir dire examination included in case on appeal, [illegible] sion of solicitor to file exceptions or cross-case [illegible] G.S. § 1-282, 15-180.

19. Criminal Law ⇐1042(1)

Inference of drunkenness [illegible] Federal Constitution [illegible] Amend. [illegible] 27, G.S. § 14-7.

On an indictment charging [illegible] defendant [illegible] in the first degree [illegible] a verdict of [illegible]

The State's evidence tended to show that [illegible] of July 1962 [illegible] was [illegible] be in charge [illegible] Griffin's house on Cross Street in [illegible] South Carolina. Wade Griffin was [illegible] with the [illegible] was in charge of defendant was [illegible] and urged him [illegible] was drinking. Griffin walked over to the car, opened the car door open, and said to defendant, "I don't want to fight you no more. I want you to go on home." Griffin then turned to the driver, [illegible] Luther Dolby, and told him to take defendant home, and Dolby started to leave. After Dolby had driven only a short distance down the street, defendant insisted that he stop the car and let him out. [illegible] by coupled with defendant's request, [illegible] defendant got out of the car and started walking toward Griffin. When the two were fairly close, defendant pulled out and shot at Griffin twice, hitting him in the stomach. Griffin [illegible] but [illegible] of the [illegible] blood. As the [illegible] Griffin [illegible] to [illegible] be help after the shots.

The police [illegible] and Griffin was taken to [illegible] A few hours [illegible] upon the scene, [illegible] went to the [illegible] explain what had happened. [illegible] second [illegible] [illegible] attorney [illegible] of rights [illegible] Defendant said that he wanted [illegible] to know that he [illegible] Griffin. According to [illegible] Williams of the Dolby [illegible] court, defendant confessed to the police that he had gotten drunk on [illegible] 1962, and that [illegible] Griffin's statement to the police [illegible] that on 4 July 1962 [illegible] went to Sylvester Jones' [illegible] crap game was in progress. [illegible] and Griffin [illegible] a ten dollar bill [illegible] most of the [illegible] Griffin [illegible] defendant left the game and went to King's Lounge on Rock Quarry Road. Griffin arrived at the Lounge [illegible] shortly after Griffin's arrival he and defendant resumed their argument about the ten dollar bill. Griffin asked defendant to

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come outside with him, and as defendant was walking out, Griffin hit him in the nose, knocking defendant down and breaking his nose. Defendant told the police that at this time he had a .38 caliber pistol in his pocket. He left the King's Lounge and went to his house for awhile, and then decided to catch a ride and go see a friend who lived in the vicinity where the shooting occurred. When he arrived in the area, he saw Griffin and Griffin came over to the car and started to fight defendant again. Defendant then pressured

Griffin had been drinking some beer at the King's Lounge. Following the fight defendant decided to go over to an apartment complex known as Walnut Terrace to see his sister-in-law. At the time defendant did not know that Griffin would be in the area, and he was not out looking for Griffin. He got two rides to the complex, the last being with Johnny Frazier Dolby. When Dolby got to the Walnut Terrace area, he and defendant saw Griffin on the street. Griffin came over to the car, smashed the car door open and told

Griffin then hit defendant, and defendant fell down in the street. Griffin came over to defendant and told him he would kill him. After the car had apparently shorted out, defendant fell trying to stop the car before it hit him. Defendant testified that because he wanted to keep the car the "peace" was possibly broken. Defendant had "popped off" to the effect. Defendant got out of the car and started running down the street. At this point he heard a shot and saw Griffin fall to the ground. Defendant then ran up the street behind Mr. McCue. At this point defendant testified that Griffin got up and that Griffin and defendant were facing each other. Then Griffin said, "Are you going to make good on what you have got in your pocket?" At this point defendant was no longer scared of Griffin. Defendant then shot at Griffin as Griffin was coming forward with his hands. Griffin fell to the ground and defendant stood over him and shot him four times. Griffin was dead when he hit the ground. Defendant then heard that Griffin was looking for a gun and that he was trying to keep Griffin off of him; he did not shoot to kill him.

Atty. Gen. Robert Morgan and Asst. Atty. Gen. Sidney S. Eagles, Jr., Raleigh, for the State.

Chambers, Stone, Ferguson & Lanning, by Charles L. Becton, Chapel Hill, for defendant appellant.

MOORE, Justice.

[1] Assignments of error Nos. 1, 2, 3, 6, and 7 are not brought forward and argued in defendant's brief, and consequently those assignments are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, State v. Crews, 281 N.C. 327, 189 S.E.2d 161 (1972); State v. Mel[illegible], 284 N.C. 137, 199 S.E.2d 409 (1973). Braver, in one of the prongs of the purported assignment of error, we have carefully reviewed the assignment and find them to be without merit.

By his fourth assignment of error defendant asserts that "[t]he trial court erred in its instruction to the jury in the trial portion of the bifurcated hearing of [illegible] and in its instruction of the contentions of the defendant."

[2] [illegible]

[illegible] be proved beyond a reasonable doubt before a verdict of murder in the first degree can be rendered against the defendant. The State may prove these elements in many ways. Ordinarily they are not susceptible of direct proof but may be inferred from circumstances such as ill will, previous difficulty between the parties, declarations of an intent to kill either before or after the infliction of the fatal wound, or when the evidence shows that the killing is done in a brutal and felonious manner.

"Premeditation and deliberation must be shown by circumstances and the jury, among whether there was such premeditation and deliberation, the jury may consider evidence of the absence of provocation and all other circumstances from which he knowingly was committed.

"In determining the question of premeditation and deliberation the jury must take into consideration the conduct of the defendant before and after the time of the killing, circumstances as to [illegible] attending circumstances as to [illegible] whether the act [illegible] be attributed to premeditated design or sudden impulse."

Thereafter, the court fully defined [illegible] and deliberation. With respect to the [illegible] of the charge to which defendant excepts, viewed in the context, it appears that the [illegible] by the court was not an expression of an opinion that there was no evidence of provocation in the case. To the contrary, this instruction was a correct statement of the law in the event [illegible] given by the court, as required by G.S. § 1-180, to assist the jury in reaching a verdict. It is in accord with many well-reasoned decisions of this Court. See State v. Van Landingham, 283 N.C. 253, 195 S.E.2d 297 (1973); State v. Duncan, 270 N.C. 412, 158 S.E.2d 63 (1967); State v. DeBruce, 259 N.C. 73, 129 S.E.2d 601 (1963); State v. Hendry and State v. Chandler, 256 N.C. 674, 124 S.E.2d 791 (1962).

[3,4] Defendant next contends that the manner in which the court summarized the

evidence relevant to the issue that there was no prosecution in the case. The paragraph in the charge complained of is as follows:

"The State's evidence tends to show that the defendant got a ride with Bobby to the Walnut Terrace area; that he had a pistol at the time of going there; that he got out of the automobile of Bobby and returned toward John Griffin after they had words as they passed in the automobile and the State's evidence tends to show that John Griffin did not have a weapon, was not advancing on the defendant in any way, did not make any act or attempt to make any act which would cause the defendant to believe that he was in danger of death or great bodily harm, and that he, without any provocation, shot and killed John Griffin with a pistol."

This recapitulation of the evidence is substantially accurate. The portion of the charge to which defendant excepted is not subject to the objection that it expresses an opinion as to the weight of the evidence. It merely gives the contentions of the State. The jury could not have misunderstood the court's statement as an expression of opinion that the State's evidence was true. The court's statement of the State's contentions was accurate and defendant's evidence was in fact favorable to him. No prejudice appears.

[5] Under the next assignment defendant also contends that the trial court erred in stating the following contention in such a manner that the jury could reasonably infer that this statement was the court's opinion:

"The State contends upon the plea of self defense that there was no evidence that Griffin was at the time making any assault on the defendant or threatening him with an assault, that there was no circumstance from which the defendant might reasonably have believed that he was about to suffer any death or great bodily harm . . ."

This contention was amply supported by the State's evidence. Again defendant has only the choice to this exception between a narrow and a strained construction. Therefore, see State v. Tate, [illegible] 7 Strong, N.C. Digest, Criminal Law [illegible].

[6] Defendant contends that the manner in which the trial court stated defendant's contentions kept evidence favorable to defendant from the jury. The evidence to which the charge complained of is as follows: "The defendant contends that he was compelled to defend himself, that he was put in fear and put in such fear that he was compelled to shoot in order to save his own life." Defendant argues that here the court "so ill advised" limited the jury to consider only that evidence favorable to defendant which tended to show that he was in fear and put in fear by the deceased at the time he shot him. The State's evidence was that there was no fear and no cause for fear. Therefore, the court's statement of defendant's contentions was in accord with defendant's evidence and was in fact favorable to him. No prejudice appears.

By assignment of error No. 5 defendant asserts that "[t]he trial court erred in failing to give a full instruction on the cu-

cumstances under which the jury could return a verdict of not guilty . . ." Defendant contends that the charge limited in effect the verdict of not guilty to a finding by the jury that defendant killed the deceased in self-defense, and that under the decisions in State v. Woods, 226 N.C. 289, 37 S.E.2d 897 (1946), and State v. Ramey, 274 N.C. 325, 163 S.E.2d 376 (1968), the court erred in failing to instruct the jury that if the State failed to satisfy it from the evidence beyond a reasonable doubt that the defendant was guilty of murder in the first degree or murder in the second degree or manslaughter, the jury should return a verdict of not guilty.

[7] The statement and the exception on which it is based do not comply with well established appellate rules. Except [illegible] or attempt to point out the part of the charge to which exception is taken. Those exceptions which do not comply are ineffective. See Rule 19(3) of the Rules of Appellate Procedure, 287 N.C. 671, 215 S.E.2d 253 (1975). Nevertheless, we have examined the portion of the charge to which exception is taken and find no error. The court correctly instructed the jury as to murder in the first degree and murder in the second degree as follows:

"I instruct you, members of the jury, that if you find from the evidence beyond a reasonable doubt that on or about the [illegible] of the year the defendant, Jesse Thurman Foulke, did unlawfully, willfully and without premeditation and deliberation kill John Griffin with a pistol and thereby proximately caused the death and that Jesse Thurman Foulke then intended to kill John Griffin and that he went with malice and premeditation and deliberation, if you find all of these facts to exist beyond a reasonable doubt, it would be your duty to return a verdict of guilty of murder in the first degree. If you do not so find or have a reasonable doubt as to any one or more of these things, you would not return a verdict of guilty of murder in the first degree.

"If you do not find the defendant guilty of murder in the first degree, you must determine whether he is guilty of murder in the second degree. The difference is that first degree murder requires the jury find the killing was done with deliberation and premeditation, and with malice. In second degree murder, the law implies malice from the use of a deadly weapon, but does not imply premeditation and deliberation. If you do not find the defendant guilty of murder in the first degree, it would be your duty to return a verdict of guilty of murder in the second degree if you do not so find, or have a reasonable doubt as to any one or more of these things, you would not return a verdict of guilty of murder in the second degree."

In instructing on manslaughter the court said:

"If you do not find the defendant guilty of murder in the second degree, you must consider whether he is guilty of voluntary manslaughter. And in that charge if you find from the evidence beyond a reasonable doubt that he did on the day in question shoot John Griffin proximately causing his death but you are satisfied that he did it without malice in the heat of sudden passion [illegible] aroused by adequate provocation, as I have defined that to you, or if you find that is established beyond a reasonable doubt but you find that although he believed that it was necessary to shoot John Griffin to pro-

tect himself, he did not have to establish for that belief, then it would be your duty to return a verdict of guilty of voluntary manslaughter.

"If, although you are satisfied beyond a reasonable doubt that the defendant did intentionally shoot John Caffey and thereby proximately cause his death, if you are satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable ground to believe and did believe [illegible] the deceased John Caffey [illegible] or reasonably appeared to the defendant to be about to kill him or to inflict upon him great bodily harm, and that the defendant did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm, then it would be your duty to return a verdict of not guilty of voluntary manslaughter."

The trial judge inadvertently failed to give such instruction. The necessity for such instruction is not affected by the fact there was plenary evidence upon which the jury could have a finding that a bullet wound inflicted upon Mabry by defendant proximately caused his death. *State v. Redmon*, supra; 176 N.C. 753, 97 S.E. 31; 63 (1950)." Second, *State v. Woods*, supra.

As in *Rooney*, the trial judge in the present case inadvertently failed to give such instruction. This was error. However, in

"Even [illegible] the verdict [illegible] it does not [illegible] [illegible] a new trial [illegible] [illegible] First, the verdict of [illegible] as the jury could [illegible] [illegible] not. *State v. Moore*, 227 N.C. [illegible] [illegible] in the charge as it related to [illegible] the first degree. On the [illegible] when the jury is instructed that it may find defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty, and the verdict is guilty of murder in the second degree, an error in the charge as to manslaughter will require a new trial. In such event it cannot be known [illegible] or the verdict would have been man-

slaughter if the jury had been properly instructed. But where, as here, the jury was properly instructed as to both degrees of murder and yet found defendant guilty of murder in the 1st degree rather than the second degree, it is clear that error in the charge as to manslaughter was harmless. In *State v. Moore*, 124 N.C. 805, 32 S.E. 15, the jury found that beyond all reasonable doubt the prisoner slew the deceased wilfully, deliberately and with premeditation and was guilty [illegible] [illegible] the deceased was [illegible] from the [illegible] [illegible] the charge as to manslaughter was [illegible] [illegible] in the charge as to manslaughter would require a new trial. In such event it cannot be known [illegible] or the verdict would have been mansl

having transpired at the trial of the matter.

"1. That the jury was not transcribed.

"2. That the State questioned the prospective jurors with regard to their attitudes about the death penalty and advised them that death would be the penalty as a result of a first degree murder verdict.

"3. That two persons were excused for cause because of their views on capital punishment."

Now defendant seeks by this assignment of error, . . . [1] that the exclusion of the only witness who was allowed to testify for the defendant was not transcribed and is not available for review, . . . [2] that the prospective jurors were questioned as to their attitudes about the death penalty and advised that death would be the penalty as a result of a first degree murder verdict, . . . [3] that two persons were excused for cause because of their views on capital punishment.

. . . .

. . . .

. . . .

against its infliction? Was an excused juror's response ambiguous? Was one of the jurors excused because he said that he could not vote for the death penalty in this particular case? We do not know the answer to these questions; there is no transcript."

In effect it is now defendant's position that the stipulation entered into by defense counsel and the State is insufficient in that it does not provide the Court with adequate basis for determining whether the two jurors already excused for cause because of their opposition to capital punishment and their inability to render an impartial verdict on the issue of guilt or innocence in accordance with the trial court's instructions were properly excused. We agree that the stipulation is deficient in certain respects, but we do not think it is fatal to the validity of the trial. The stipulation does not purport to be a complete transcript of the proceedings at which the two jurors were excused. It merely recites that they were excused for cause because of their opposition to capital punishment and their inability to render impartial verdicts on the issue of guilt or innocence in accordance with the trial court's instructions. It

NOV 29 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

TERM, 1974

73-7031

JESSE THURMAN FOWLER, PETITIONER

v.

STATE OF NORTH CAROLINA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED JULY 19, 1974
CERTIORARI GRANTED OCTOBER 29, 1974

In the Supreme Court of the United States

TERM, 1974

No. 73-7031

JESSE THURMAN FOWLER, PETITIONER

v.

STATE OF NORTH CAROLINA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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CHRONOLOGY

July 1, 1973: Complaint filed charging that petitioner "on or about the 1 day of July, 1973, . . . , did unlawfully, wilfully, and feloniously and of his malice aforethought kill and murder John Griffin."

July 10, 1973: Preliminary Hearing in district court held, probable cause found, and petitioner bound over to Superior Court.

July 30, 1973: Grand jury returned true bill indicting petitioner for the murder of John Griffin.

September 24, 1973: Petitioner arraigned and pleaded "not guilty;" jury selected and empaneled for petitioner's trial.

September 25, 1973: Petitioner's motion for judgment as of nonsuit* denied at close of State's evidence; this motion renewed and denied at close of petitioner's evidence.

September 26, 1973: Jury instructed that it may find petitioner not guilty, guilty of manslaughter, guilty of murder in the second degree, or murder in the first degree. After deliberation, jury returned verdict of guilty of murder in the first degree. Petitioner's motion to set aside the verdict as being contrary to the evidence denied.

September 27, 1973: Petitioner's motion in arrest of judgment denied. Judgment, Commitment, and Sentence entered, sentencing petitioner to be executed "by inhal[ing] lethal gas." Petitioner filed Notice of Appeal to North Carolina Supreme Court.

April 10, 1974: Supreme Court of North Carolina affirmed petitioner's conviction and sentence of death, with three Justices dissenting.

April 17, 1974: Mr. Chief Justice Bobbitt of the North Carolina Supreme Court issued a stay of execution "pending further orders of this court" to enable petitioner to file a petition for certiorari in the Supreme Court of the United States.

July 9, 1974: Petition for certiorari and motion to proceed *in forma pauperis* filed in Supreme Court of the United States.

October 29, 1974: Petition for certiorari and motion to proceed *in forma pauperis* granted.

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*The motion for judgment as of nonsuit is the same as a motion for a directed verdict of not guilty, or a motion for an involuntary dismissal. N.C. Gen. Stat. § 15-173 (1965); *State* v. *Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969).

[ROA 2]* WARRANT No. 73CR41907

IN THE GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION,
STATE OF NORTH CAROLINA, COUNTY OF WAKE

THE STATE OF NORTH CAROLINA

v.

JESSE THURMAN FOWLER

COMPLAINT FOR ARREST, MURDER

Age 24, Race N, Sex M
1817 Liberty Place, Raleigh

The undersigned, W. L. Baker, being duly sworn, complains and says that at and in the County named above and on or about the 1 day of July, 1973, the defendant named above did unlawfully, wilfully, and feloniously and of his malice aforethought kill and murder John Griffin.

The offense charged here was committed against the peace and dignity of the State and in violation of law GS 14–17.

(S) WILLIAM L. BAKER.
Complainant.

[ROA 3] Sworn to and subscribed before me this 1 day of July, 1973.

(S) H. R. BROWN,
Magistrate.

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*"ROA" stands for "Record on Appeal", and the subsequent numeral indicates the page at which a particular item is found in the printed Record on Appeal in the Supreme Court of North Carolina.

[ROA 4] INDICTMENT—MURDER—No. 73CR41907

IN THE GENERAL COURT OF JUSTICE, SUPERIOR COURT DIVISION,
STATE OF NORTH CAROLINA, COUNTY OF WAKE

(2nd July Crim. "R" Session, 1973)

THE STATE OF NORTH CAROLINA

v.

JESSE THURMAN FOWLER, DEFENDANT

THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, That Jesse Thurman Fowler, late of the County of Wake on the 1st day of July, 1973, with force and arms, at and in the said County, feloniously, wilfully, and of his malice aforethought, did kill and murder one John Griffin contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State, G.S. 14–17.

(s) BURLEY B. MITCHELL, JR.,
Solicitor.

[ROA 5] WITNESSES:

X Johnny Dolby
X Jonsie Griffin
X Paula Griffin
D. C. Williams (RPD)
Charles McCoy

Those marked X sworn by the undersigned foreman, and examined before the Grand Jury, and this bill found—A True Bill.

(s) WILLIAM T. BAREFOOT,
Foreman Grand Jury.

[ROA 5] ARRAIGNMENT OF PRISONER

AND NOW the defendant the said Jesse Thurman Fowler being brought to the Bar of the Court by Robert J. Pleasants, Sheriff of Wake County in whose custody he is and forthwith it being demanded by the Court that all persons remain silent upon penalty, and the said Jesse Thurman Fowler being then and there present and represented by Counsel John Brooks, Esq., the Bill of Indictment heretofore set out is read to him

and forthwith it being demanded of him how he will acquit himself of the premises in the said Bill of Indictment specified and charged upon him, he saith he is not guilty thereof and for good and for evil he puts himself upon God and his Country. And therefore, let a jury be drawn of good and lawful men by whom the truth of the matter may be better known.

And the defendant, the said Jesse Thurman Fowler is remanded to the custody of the Sheriff.

This the 24th day of September, 1973.

(S) HENRY A. MCKINNON, JR.,
Judge Presiding.

[ROA 9] VERDICT

The jury, after deliberation, returned into open Court with the following verdict as returned by their foreman:

"We find the defendant guilty of murder in the first degree as charged."

Upon motion of the defendant through counsel, the jury was duly polled, each juror answering to their name individually and each assenting to the verdict of guilty of murder in the first degree as charged, as returned by their foreman.

This 26th day of September, 1973.

(S) HENRY A. MCKINNON, JR.,
Judge Presiding.

To the foregoing Verdict, defendant objects and excepts. Exception No. 2.

[ROA 9] JUDGMENT AND COMMITMENT

In open court, the defendant appeared for trial upon the charge of murder in the first degree and was arraigned as appears of record and thereupon entered a plea of not guilty. A jury was selected and empaneled and heard evidence for the State and for the defendant, and after deliberation returned as its verdict that the defendant was guilty of murder in the first degree as charged.

He having been found guilty of the offense of murder in the first degree as charged, which is a violation of G.S. 14–17 and of the grade of capital felony. The defendant was given the opportunity to be heard before judgment

[ROA 10] It is ADJUDGED that the defendant be remanded to the Common Jail of Wake County and there remain until the adjournment of this Court, and that he be conveyed by the High Sheriff of Wake County to the State Prison of the State of North Carolina at Raleigh, North Carolina, and by such sheriff be delivered to the Warden of said prison; and

It is FURTHER ORDERED and ADJUDGED and DECREED that he remain in the custody of said Warden until Friday, the 30th day of November, 1973, and that on said day and between the hours of 10:00 o'clock in the forenoon and 3:00 o'clock in the afternoon that he be taken by the said Warden to the place provided for execution in said prison; and

It is FURTHER ORDERED and ADJUDGED that the said Warden, Deputy Warden or such other person as may be designated according to law, then and there take him the said Jesse Thurman Fowler into the permanent death chamber which has been provided in said prison and there and therein cause him to inhale lethal gas of sufficient quantity to cause death to be administered to him and to continue said inhaling of said lethal gas by him until his death.

It is ORDERED that the Clerk deliver two certified copies of this Judgment and Commitment to the Sheriff or other qualified officer and that said officer cause the defendant to be delivered, with such copies as commitment authority, to the appropriate official of the State Department of Correction.

This the 27th day of September, 1973.

(s) HENRY A. McKINNON, Jr.
Judge Presiding.

[ROA 11] Attorney for Defendant: John Brooks
Attorney for State: Joseph A. Calder

Date certified copies of judgment delivered to Sheriff for commitment: 10-1-73

To the foregoing Judgment, the defendant objects and excepts.

Exception No. 3.

[ROA 11] SENTENCE

Jesse Thurman Fowler, you have been indicted, tried and convicted by a jury of your county of the murder in the first degree of one John Griffin. The law prescribes in Section 14-17

of the General Statutes of North Carolina that the punishment for your crime is death. The judgment of the Court therefore is that you be remanded to the Common Jail of Wake County and there remain until the adjournment of this Court.

IT IS ORDERED that you be conveyed by the High Sheriff of Wake County to the State Prison of the State of North Carolina at Raleigh, North Carolina, and by such sheriff be delivered to the Warden of said prison; and IT IS FURTHER ORDERED AND ADJUDGED AND DECREED that you remain in the custody of said Warden until Friday, the 30th day of November, 1973, and that on said day and between the hours of 10:00 o'clock in the forenoon and 3:00 o'clock in the afternoon that you be taken by the said Warden to the place provided for execution in said prison; and IT IS FURTHER ORDERED AND ADJUDGED that the said Warden, Deputy Warden or such other person as may be designated according to law, then and there take you the said Jesse Thurman Fowler into the permanent death chamber which has been provided in said prison and there and therein cause you to

[ROA 12] inhale lethal gas of sufficient quantity to cause death to be administered to you and to continue said inhaling of said lethal gas by you until your death.

This the 27th day of September, 1973.

Signed HENRY A. McKINNON, Jr.
Judge Presiding.

To the foregoing Sentence, the defendant objects and excepts.

Exception No. 4.

[ROA 14] STATEMENT OF THE CASE ON APPEAL

The defendant, Jesse Thurman Fowler, was arrested on or about July 2, 1973 and charged in a warrant with first degree murder. A true bill of indictment was returned by the Wake County Grand Jury during the second July, 1973 Regular Criminal Session of Court.

The case came on to be heard in the Superior Court of Wake County on September 24, 1973. The defendant entered a plea of not guilty and was tried before a jury. The jury returned a verdict of guilty of first degree murder.

Exception No. 5.

Thereupon, the Court, the Honorable Henry A. McKinnon, Jr., Judge presiding, pronounced judgment and sentenced the defendant to death.

Exception No. 6.

Upon the entry of the judgment and pronouncement of sentence, the defendant in open court gave notice of appeal.

The Honorable Joseph A. Calder appeared for the State. The defendant was represented by the Honorable John Brooks.

[ROA 16] STATE'S EVIDENCE[1]

COURT: You may call your first witness.

Mrs. Mary Raines, being first duly sworn, testified as follows:

Direct examination by Mr. CALDER:

My name is Mary Raines. I live in an apartment at 1300 Branch Street, Raleigh, North Carolina. My son and I have lived there for a year. He is seventeen. I know John Griffin. I have known him since he was a small boy, but I hadn't seen very much of him for the last four or five years but I seen him that particular day, which was the first day of July.

I know Mrs. Christene Hall. She lived down the street from me—about two blocks, I guess.

Yes, sir. I know the two smaller children but I didn't know their names. I knew that John Griffin and Christene Hall were at one time husband and wife. I used to meet them at the Parent-Teachers meetings and that is where I met the wife and the children. I saw the children on the first of July. They were with their daddy right across in front of my house. I was sitting on my front steps at that time. My next door neighbor's little girl and another boy, William Allen, were sitting there with me.

I spoke to John Griffin when he was out in front of my house for about 30 minutes. Well, we was talking about the children and how I used to give him nickels and dimes when he was smaller. No special thing. And he said that he was sick and he was going back to the Veterans' Hospital the next week. His baby girl was trying to get some money from him.

[ROA 17] Q. While John and the two girls were out in front of your house, did a car come driving up?

A. I don't know when that car came up over there. When I noticed the car was across the street from my

[1] Rule 19(4) of the Supreme Court of North Carolina provides that "[t]he evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception." The Court is familiar with the North Carolina practice of "narrating" the transcript on appeal. *Bumper v. North Carolina*, 391 U.S. 543, 546 n. 8 (1968).

house on the other side of the street and there were two men in the car. I didn't know those two men because I thought they were his friends. One of them called him and told him to come here, John. He went over there and just turned after he said something—"I am tired of you all bugging me," and he come right on back to the children and squatted down on the sidewalk. Well, when I looked again, the car was gone.

John still stayed out there with the children and I asked him what the little girl wanted. He said "Money," and I said, "Give it to them." And he said that they better go back home to their mama and the larger girl started on back and the little one started standing and he started behind her like he was going to make her run on back home. She walked on off and a few minutes this fellow come running from that direction, the way they, the children were going, and ran up the bank to my steps in the street and began to shoot John in front of my eyes and I couldn't even get up. There was another man coming up the street. I don't know if that is he sitting there.

The man with the gun came from the same direction that the children had gone. I did not hear him say anything. I did not hear John say anything to him. I did not hear the third man say anything. When he shot John, the little girl was nowhere from him, not far. Just a little step away.

The gun was fired twice I know and then I heard the gun say "Click, click," and it must wouldn't do it no more. The

[ROA 18] man that was shooting ran back down the street the same way he come, but he was up on the sidewalk this time and the first time he was down on this little small walk. The sidewalk is up higher than the street level. John, he kind of stood up like that and he found out he couldn't walk and he got down like this and rolled to my doorstep and took hold of the side of the porch and walked up an took hold of my screen door and turned around and I asked him, "Did that man shoot you?" He said, "Yes, two times in my stomach and in my leg."

I was still hollering right on. He said, "Call my mama and call an ambulance." I said, "All right." But I never did. I kept hollering until I got a whole crowd there and I sent somebody in there to call his mother and the police. The police come and then the ambulance come. And the pillow I was sitting on, I took, raised his head up and put it under his head like that, but I was so nervous I couldn't hold it. Somebody else did take it and hold it for me.

Q. All right. Were you able to recognize the man that was shooting out there?

A. I didn't pay him but a very little attention. He looked like he was kind of a brown-skinned fellow. He turned this way and I am sitting over here on the porch and he was shooting that way at John. I wouldn't have known him if he had come back. I hadn't seen him before. I do not know who was driving the car that I had seen.

Afterwards, I did not see him throw any gun down. I just saw him run back down that way. It took the police about five or ten minutes to get there, I reckon. The law come earlier than the ambulance did. The ambulance come and got him. There was a hundred people there in a few minutes.

Q. Was John still conscious when the
[ROA 19] ambulance got there?

A. Well, that was the last thing he said to me when he asked me to call his mama and the ambulance. Before he said that, he told me the man had shot him two times.

He didn't bleed a drop at my porch. Not even one drop. I ain't seen a drop of blood. So he must have been bleeding inward. During the time he was waiting for the ambulance, he was laying on my porch with his head on the steps. He wasn't able to stand up.

Q. What happened to the children?

A. Their mama came up the street, I reckon. I don't know who told her but the mama come up the street and got the children. One of them just fell out there. The oldest one, I think. They carried them on back home around the corner.

Mr. CALDER. I believe that is all the questions I have.

Cross Examination by BROOKS:

John's two children were with him. Sitting with me was a little girl named Cathy and Mrs. Annie Lee Allen's boy when the first shot was fired but the other girl was sitting on this side of me minutes before the first shot was fired. So she didn't see it. I first saw John after he come out there in the street and I was sitting there trying to write a letter. I was sitting on the steps. My apartment is on Branch Street right where you turn in off Holman Street. It's the first house right on the corner. There's a big vacant lot right between me and Holman Street.

Q. Was John still talking with you at the time the car of which you speak approached the intersection of Holman and Branch Streets?

A. After he spoke with the men in the car,
[ROA 20] I don't know when the car left because I just thought it was his friend. I didn't pay it no attention. At the time that car first appeared John Griffin was right in front of the house on the sidewalk with the children.

Q. Were there other people sitting out in the yards and on porches?

A. I didn't pay no attention because the little girl from the next door was with me and this other boy from around the corner. They was children and things across the street but I don't think there was any right around me. I don't know Charles McCoy by name. I had known John Griffin since he was a small boy. I don't know how old he was.

COURT. Could you give us your best estimate about how old he was?

A. He might have been around 25 or 30, I reckon. I can't say for sure. Recognizing that I hadn't seen him for about five years, I didn't know about his general conduct. No, I never heard he had been in prison.

Q. Have you ever seen the defendant sitting here with me before?

A. Not before today. Not in his face to look at him.

Q. And you indicated that you were aware of a car stopping in front of your house?

A. Well, the car—I wouldn't have paid it no attention if they hadn't called John to the car. The little girls at that time were still standing there on the sidewalk. I was told that the little girls, that they were John's. They lived with their mother. No, I don't think John Griffin and his wife were living together. The mother lives in my neighborhood off Walnut Terrace, about two blocks from around the corner. She has been over there four years and I have been over there a year. I lived on Battle Street.

They tore my house down. I don't know
[ROA 21] where John lived.

Q. Now after this car stopped and you indicated it drove off again, was that within seconds of the time it stopped?

A. I don't know when it come up there and I don't know when it left. From the time they called him to the car and the shooting I reckon it was about five or ten minutes.

Q. But I believe you indicated that you asked John did that man shoot you?

A. That's right. He was at my steps right by me.

Q. Then you did not see the man shoot that boy?

A. Yes, sir, I did see that man shoot that boy.

Q. But you did ask John did that man shoot you?

A. That is how crazy I was. I was tore all to pieces. I saw the man shoot John. The person whom I observed shooting John ran back toward the schoolhouse. At the time I saw the car it was headed that—toward Highway 401. Yes, it was headed that way. I don't know which way the car went because I don't know when it left. The person I saw running up to John come from the direction of Highway 401, the way the car was headed, which I didn't see the car go.

After the shooting, the person who had done the shooting went back toward the east, toward Highway 401. Griffin at the time of the shooting was up there on the sidewalk. Well, it wasn't right in front of my house; it was towards the east of my house. I had not seen John go in that direction. John was just trying to get the little girl home. He was, you know, patting on behind her. The two little girls live to the east of my house, about two blocks. The person whom I saw shoot John had a gun. He had it already out in his hand and doing just like that. I don't know what kind of gun it
[ROA 22] was. It was a pistol. I saw John at the time of the shooting. I was sitting on the steps. He had nothing in his hand. The person who had done the shooting just ran out down the street. He had the pistol still the last time I saw him. I stayed outside after the shooting until it got dark, just hollering.

This occurred, I reckon, about 20 minutes before dark. When the police and ambulance arrived, it was not already dark. The police just told everybody to get back so the ambulance could get there and so the man could get some air. They just crowded up around him. They took him and went away and somebody called me back later and said John had died.

It had got dark then. Then the police come by all night for two or three hours. Someone called me at my home. I don't know who the boy was.

Mr. Brooks. No further questions of this witness, your Honor.

Johnny Frazier Dolby, being first duly sworn, testified as follows:

Direct examination by Mr. Calder:

My name is Johnny Frazier Dolby. I go to school at Hardbarger and I work at night at the Bus Garage at Carolina. I'm taking Business Administration at Hardbarger's. I have been out there about a month. Before that I was in service for two years and a couple of months. I am not married. Mrs. Hall is my aunt. And Mrs. Hall was John Griffin's former wife.

Q. And did you know the girls Paula and Jonsie and Christine?

A. Since I got out of the service, I stay with
[ROA 23] Mrs. Hall and her children, Paula, Jonsie and Christine and Mr. Hall.

I know the defendant. I know him by the name Hucklebuck. That is his nickname. I have been knowing Jesse ever since '68. My family knows him real good but I didn't. I didn't stay in Raleigh that much. I got to be friends with him before I even joined the service.

I recall the incident that we are talking about, the first day of July, 1973. I think I was at Jesse's house that Friday night. I was over there. I think it was Friday night or the week before that one.

This afternoon there on Branch Street, Jesse Fowler was riding with me. I had picked him up on the corner of East and Lenoir Street, I think. It is on the other side of Highway 401. We rode together about five or eight minutes before we got over to Branch Street. I did not see him at any time that day before right then. I had been sleeping all day. I did notice something unusual about Jesse's appearance when I picked him up. I saw some blood on his T-shirt, and I asked him, "What is your T-shirt doing bloody?" I was laughing about it. He said he and John Emory got in a fight.

Q. Did you know what John he was talking about?

A. He called John Griffin's name out. No, he didn't tell me what they were fighting about. He did not say when and where they had been fighting. He did not say anything else about the fight.

I drove on over; I stopped the car near Branch and Holman Streets.

Mr. Brooks. Objection.

Court. Don't lead him.

As I was turning off Holman Street, I was
[ROA 24] going to Branch Street and John came toward the car and I stopped. John snatched the door of the car open.

Q. And what happened then?

A. And I told him, "Don't snatch the car door open no more," and he shut the car door and he told me—he told Huck, he said, "I don't want to fight you no more. I want you to go on home," and Huck told me to take him on home and I said, "Okay," and I drove off and then I got down a couple of yards. Huck told me to let him out. I said I am going to take you home. He said, "No, let me out." I stopped the car and when he got out, I drove off. I went on home.

Q. Did he say for you to leave?

A. He didn't say nothing. I just drove on off. After he got out of the car, he went in the opposite direction I was going in. I was going toward 401 East and he was going back toward the other way. I could not see John at the time Jesse got out of the car. I didn't even look back. I just kept on driving. I went around to my aunt's house. She lives on Branch Street, too, but you have to go around the corner to get there. I told my aunt to go around there and get Ringaling and Tootsie. That is their nicknames.

COURT. For the children?

Jonsie and Paula. Those are their nicknames. I told her to go and get them because Huck went back down toward John and so I just stayed out in the yard and that is all. She started to leave, but she came on back because Jonsie came back around to the house. Jonsie is the oldest one of the two. I had seen Jonsie and Paula down there with their daddy.

I didn't go down there to where the shooting had occurred afterward. I sat in the yard and I saw Jesse going on top of the
hill. It is not exactly a hill. Between the apart-
[ROA 25] ment house and the trash can. He cut between there and I hollered at him and he throwed his hand up and kept on walking. He did not go up to the highway. I didn't see him anymore. They took me down to the police station and asked me a whole lot of questions. They turned me aloose down there about 11:00 o'clock that night. I had not been at Sylvester Jones' house at any time during that day.

Q. Had Jesse been drinking—could you tell?

A. Yes, sir.

Q. How could you tell?

A. His eyes were red.

There was nothing unusual about the way he spoke to me. Yes, he could walk all right.

Q. Could you smell alcohol on his breath?

A. I wasn't that close to him. I didn't see any liquor with him. I did not see a gun. He did not say anything about a gun.

Jesse lives in South Gate. I don't know the house number. It is not over there on East and Lenoir Streets.

Mr. CALDER. That is all the questions I have.

Cross examination by Mr. BROOKS:

I live at 1338 Branch Street. It is a straight street. Not a one-way street. It does have a curve in it. In some places—it does go east and west. Just goes east and west. That is all. My house faces north; it faces out toward 401 Highway.

Q. Which way does Highway 401 run?

Whether 401 Highway runs north and south
[ROA 26] or east and west, I don't know. Leaving Raleigh, 401 goes south, down toward Smithfield, Fayetteville, North Carolina. 401 runs beside Memorial Auditorium.

Q. All right, so 401 runs north and south?

A. Yes, sir. My house faces 401; that would be east, I think. The house where I live is connected to other houses. The area where I live, we used to call it for the war in Viet Nam.

Q. What proper name does it have?

A. Walnut Terrace. Walnut Terrace is primarily a group of apartments. I do not live in a corner apartment.

Q. Does Branch Street run parallel in the same direction that 401 runs in, except for the curve part?

A. Yes, it runs parallel, except the curve part. And in front of the house where I live, it runs north and south like 401. It also intersects into Holman Street. Holman Street runs north and south parallel to 401 also. It does run parallel to the part of Branch Street where I live. Branch Street runs into Holman Street at some point to form an intersection. Branch Street forms a 90 degree angle with Holman Street. The curve in Branch Street is a right angle curve.

Q. All right. So Branch Street runs both east and west and north and south, is that correct?

A. I don't know nothing about the directions.

I picked up the defendant, whom I call Hucklebuck, at the corner of East and Lenoir Street.

Q. What is your estimate about the time that it was?

A. Could have been about 6:30 or 7:00 o'clock, in the afternoon. The defendant waved me down. He told me to give him a ride to Walnut Terrace. He did not
[ROA 27] tell me why he wanted to go to Walnut Terrace. There was blood on his shirt. I didn't pay too much attention to whether that blood was dry or stained. I was headed home. He told me to give him a ride to the Terrace and that is all.

On July the first, 1973, I went to bed about 7:30 or 8:00 o'clock that Sunday morning. I got up about 4:30 in the afternoon. In the afternoon, I got up and then I ate and then I laid back across the bed. I was feeling bad. Yes, sir, I told defendant that I had been in bed and told him I was going back home and go to bed. When he got in my car, I gave him a cigarette. I have known defendant rather continuously since 1968; I stayed with him in Washington, D.C., in 1969—during the summer. I stayed with him until about a year or so. I know about defendant's general conduct. To me, it was general good conduct. John Griffin visited the defendant and stayed with him at Washington, D.C. Jesse got John and my brother a job up there with Hillside Terrace at 23rd Street, Southeast. I had came back home. I don't know how long John stayed with the defendant in Washington, D.C. From my knowledge the defendant and John Griffin were rather well acquainted. They partied together most of the time. I have known John Griffin ever since I can remember. I am twenty-two.

I do not know what year John Griffin married Mrs. Hall, his first wife.

Q. Do you know anthing—have you ever had an opportunity to observe John Griffin's conduct?

A. I have heard talk of his conduct but I ain't never been around John since he was older than I was.

Q. Do you know anything about his general
[ROA 28] reputation?

A. Some folks say John will knock you in the head if you turn your back. I never observed any of his conduct on my own.

When I went over to Walnut Terrace, I came down—it is Fayetteville Street. I turned left at Peacock's Store. I came to a stop sign, turned back right on Holman Street and then I turned back left off to go to Branch Street. At that point,

Branch Street deadends into Holman. But Holman Street continues across the intersection. At the time I turned left onto Branch, I saw John and his two children standing on the corner of Branch and Holman, to my right as I turned left. I think that's the south side of Branch; I am not too sure. They were standing on the sidewalk. They were not in front of any apartments. They were in front of a little acre or open space.

When I turned that corner, John come toward the car. Neither I nor the defendant called out to him. John Griffin did not call out to us. He came toward the car and I stopped. When I stopped John snatched the car door open and I told him, "Don't snatch the car door no more." He told Huck—said, "I don't want to fight you no more, man." He said, "Why don't you go on home." I don't know how he was saying it because everything John said, I usually don't pay no attention to it. I didn't take it seriously. That is about all he said. Huck didn't say nothing to John. Huck just sit there in the car and that is all. Then I drove about halfway between those departments. It could have been half a block and could have been less than that; could have been ten car lengths.

I heard something about the reputation of John and his general reputation. Yes, sir, when he started to drinking, John Griffin had a big month. I do not know whether he had been drinking that day. It sounded like he might have been.

[ROA 29] From where I stopped and where the defendant got out, my house was around the curve, about 20–25 car lengths. I had on a radio during the time I was driving along, including at the time I was stopped by the defendant. Between the time I picked up the defendant and the time I got home, I turned the radio up. At the time the defendant got out of my car, I was going toward the east, toward 401, which is the same direction my house faces. I had stopped just for a second.

Defendant got out of the car and got on the sidewalk and went back toward John, heading west. On July the first, 1973, I thought John Griffin was staying in Goldsboro but I saw him in Raleigh most of the time. John Griffin had remarried, I think.

I never been arrested for any offense. Up until I was sixteen, I stayed in a foster home in Knightdale. I knew the defendant about a year before I left the foster home.

Mrs. Hall has one child named Howard Griffin. Everybody calls him Skip. Skip is 18. Got one named Ray Griffin. Everybody call him Monkey. He is 15 or 16 I think. Then she got one named Red—Lon Griffin; everybody called him Red. Red about 15. I think. She got another one, Tingaling; her name is Jonsie Griffin. She is 11 or 12 one. And got one named Paula Griffin. She is nine. Everybody calls her Tootsie. That is five of them. They were living at Mrs. Hall's on July the first, 1973. On this July first, 1973, there won't none of them outside really. Nobody but Toctsie and Tingaling. (Jonsie/Paula). They were down there with their daddy. They could have been outside. There were so many people outside I wasn't paying no attention. When I stopped the car in the middle of that block, I did not see them again. I saw them again when they came back around to the house. This could have been about 20 minutes or 30 minutes after I had first seen them. It
[ROA 30] could have been less than that. When I saw them again, it was about—let me see, I call it dark. It won't [sic] that dark though.

I later saw defendant again going between the trash can and the other apartment, heading north.

Q. All right. And was he close to Highway 401?

A. I say about a couple of yards. That won't [sic] that close though. There are no buildings between where he was walking and Highway 401. He throwed his hand up like that and walked on away. He was walking when I saw him. He wasn't running at all. At the time I yelled to him, I had not heard whether or not there had been anybody shot on Branch Street. He got out of sight and I heard about it then.

At the time John Griffin first had the car door open talking to the defendant, I think I heard everything that he said. John shut the car door. I was not moving at the time the car door was shut.

Mr. BROOKS. No further questions of this witness, your Honor.

(Witness excused.)

Charles McCoy, being first duly sworn, testified as follows:

Direct examination by Mr. CALDER:

Charles McCoy is my name. I live in the Walnut Terrace neighborhood. I was near the corner of Branch and Holman Streets on the first day of July close to dark. I know where Mary Raines lives. I was near her house on my way home.

I was coming from the west—from the basket-
[ROA 31] ball court. I came up Holman Street to Branch and went left or east on Branch. I knew John Griffin at that time and also Jesse Fowler. I saw John Griffin first. He was holding the car door open and talking to somebody inside. I didn't speak to anybody. I wasn't that close to them. I kept walking down Branch Street and as I was crossing Branch Street, I saw Jesse. He was coming from down Branch Street away from 401, walking toward me.

Q. At that time could you see John Griffin?

A. John passed me I think. I don't know what happened to him. I saw him and then I didn't see him. He passed me I suppose and Huck was coming toward me.

Q. All right, and what unusual happened?

A. Huck was coming toward me. I was crossing the street and he wasn't exactly coming toward me. He was coming down Branch Street. I was still in the street. He came down and I think he stopped Tootsie and asked where was John.

Then he walked toward me and he pulled out a gun.

Q. And did you become aware of John at that time?

A. Not until I almost got out of the street. John bumped into the back of me. Jesse then sort of stepped to the side and fired at him. I didn't know that was John at the back of me.

Q. All right. How much time between the time you were bumped in the back and the time the gun was fired?

A. Seconds. I could see and hear the gun being fired. I also had powder burns on my left hand. Jesse was standing from three to four feet from me at the time he fired
[ROA 32] the shot. Two shots were fired. After he fired the two shots, he turned and walked away. I saw John falling down the embankment. Right on Branch Street, the apartments are down and the steps leading up to the sidewalk. It is downhill from where he was shot to where Mary Raines' door is. He didn't roll all the way. I think, he kind of ran, kinda walked away from, like maybe onto the sidewalk and then fell and rolled down the rest of the way.

I did not speak to John or Jesse, nor did they speak to me. I did not stay until the police got there. I did not see any blood. I did not see what happened to the two little girls. I passed them too, I think. I received no medical treatment for my hand. Just a blister came on it and that went off.

Mr. CALDER. That is all the questions I have.

Cross examination by Mr. Brooks:

I must have been crossing Holman Street going onto the north side of Branch Street when I first observed Mr. Dolby's car. I knew Johnny Dolby; I live close to him. He lives 1338 and I live in 1334. I knew his car. I didn't notice it was him when his car came by, but I knew it was his car.

Q. How close to the car were you at the time it first stopped?

A. About a half block. I guess. See, one thing about Branch Street—half block—maybe another block somewhere else. It is a long block. It goes all the way. Goes east to west and then north to south and goes all the way around. I am not sure I saw the car when it first stopped. I know when I saw the car, the door was open and John was standing beside the car talking. It was halfway down the block. I just heard John tell him take him on home before I make him use what he has in
[ROA 33] his pocket. John Griffin told whoever was driving to take him home before he made him use what was in his pocket. I didn't know who was driving the car at that time. I was going home. The car had to drive past me because I had to walk up Holman Street. But when I was first conscious of it, it had stopped.

Q. Did you hear any other conversation?

A. There might have been but I didn't hear it all. If I did, I don't remember it. Mrs. Hall's children were standing on the sidewalk.

On the south side of Branch Street, there were two continuous buildings. One building is long enough, I think, to hold eight or ten apartments. Each building is something like a half block long. There is a gap between the two buildings of about 30 or 40 feet. The first time I observed Johnny Dolby's car, it was stopped close to that gap between the two buildings. There were two or three cars parked along the curb of Branch Street on the south side. There may have been some on the north side but I don't remember. About two of the cars were parked between me and where I saw the car stopped.

After I crossed Holman Street, I crossed over to the northeast corner of Holman and Branch and walked for a short distance on Branch Street then I slanted my way over going across Branch Street, going to the south side. I didn't go across the street straight. I went slanted, behind the two cars. The two cars were headed west toward Holman Street. They were parked on the wrong side of the street or the left side in the sense of

how you normally park cars. I was still in the street when John Griffin bumped into me. I moved from in front of him; I was proceeding to the south side of Branch Street. When I turned after the shooting, John had got on the sidewalk and started rolling down the hill toward the apartment. I
[ROA 34] was in front of the cars. The cars were parked on the side of the street. I was still crossing the street but I was going slanting some there; he passed between me and both cars. I hit the sidewalk, after he had been shot and I walked up and I looked back and he was rolling down the embankment.

Q. I believe you indicated that you did not see John Griffin at all until he hit you?

A. I saw him as I was walking up the street. I saw him. I continued to walk. He was walking toward Holman and I was walking toward the curve in Branch.

Q. Did you see John Dolby's car move off?

A. After he stopped the car, the car moved again. I don't know how far it moved. I say about two or three car lengths. Maybe two or three car lengths. Then the car stopped again and Huck got out and started coming down the sidewalk. When I saw the car stop a second time, I was still on the north side of Branch Street. I was crossing it. About ready to cross there.

Q. About what distance did you walk down the north side of Branch Street after you crossed Holman Street?

A. I am trying to remember exactly how far it was. It is hard to measure because I was going slanting. I say the distance maybe across the street and maybe a car length going slanted. After the shooting I saw defendant on the north side of Branch Street walking off. He was just a little bit before the first apartment. There is a vacant lot on Branch. Then there is an eight family apartment building. I say middle of that building—just a little bit beyond the middle of the building. On the north side of Branch Street, there is a sidewalk going over to the north direct perpendicular to the street. The apartments are indented on Branch Street on the north side.

[ROA 35] Q. Was the place where the defendant crossed the street parallel at that point where the sidewalk runs perpendicular to Branch Street?

A. Not quite there. A little bit before where the perpendicular sidewalk is.

I was not observing John Griffin immediately before he was shot.

Q. When he bumped into you, did you turn around to look at him?

A. Huck had the gun out then. I was more interested in him then than he (who) was bumping back of me.

Q. So you didn't see the defendant at the time he was shot?

A. Where he was, no sir.

COURT. You mean the deceased.

Q. I am sorry. The deceased, at the time he was shot?

A. No.

Q. At first when you saw him he had already gone from the curb over to the sidewalk?

A. Yes.

Mr. BROOKS. No further questions of this witness, Your Honor.

COURT. Let me ask you one, Mr. McCoy.

A. Yes.

COURT. What do you say the statement that you heard at the car was, you heard Griffin make?

A. Take him on before I make him use what he has in his pocket.

COURT. Take him on——

A. Yes, sir.

COURT [continuing]. Before I make him use what he has in his pocket?

A. Yes, sir.

COURT. All right.

[ROA 36] (Witness excused.)

Sergeant Kenneth Johnson, being first duly sworn, testified as follows:

Direct examination by Mr. CALDER:

Q. State your name and your occupation?

A. Kenneth Johnson, Sergeant Raleigh Police Department. I am normally a uniformed officer. I was called to 1300 Branch Street on the first day of July, 1973. I received information from police radio as to a shooting that occured there and proceeded to that location. It was approximately 8:20 p.m. when I arrived. When I got there, a crowd had gathered.

(Marked—Two photos State's 1, 2, and 3. [sic])

Q. Did you see the man that is pictured here, there at 1300 Branch Street?

A. Yes, sir, I did. I knew him before that day. Johnny Griffin was his name. He was laying on the porch at 1300 Branch. The porch consists of a cement slab and guard railings leading up. I believe three steps to the threshold. He was lying with his head toward the north. The door to this address was open. He was lying on his back. Officer Baker and Officer Monday were at the scene approximately the same time I arrived. I went to the porch, up on the steps and squatted down beside of the deceased. There was a, just a small amount of blood on his left side. He did have a shirt on, but it was pulled up.

Q. All right. What, if anything, did John Griffin have to say to you?

A. As I squatted down beside him, I—again,

[ROA 37] he was lying on his back and his head was hanging down off that slab. I picked his head up and at first I did not recognize him as being John Griffin. I asked him, I said, "Who shot you? His first statement was, "I am bleeding inside." And he was twisting back and forth as if he were in pretty much pain. Again, I asked him, I said, "Who shot you?" And he said, "Jesse." And the crowd, there was a lot of people around. In between that statement I told the officer to have the people to back away so he could get some air. It was pretty hot there, too. I again asked him. I said, "Who shot you?" He said, "I am bleeding inside." And again, I repeated. I said, "Tell me who shot you. Who did the shooting?" He said, "Jesse Fowler."

And the ambulance had arrived and the two ambulance attendants had the stretcher, transported him to the ambulance. And some statements were taken by Officer Baker and from there we left and went to 1338 Branch where other statements and interviews were taken.

I talked to John Dolby and Mrs. Hall and the two children that were supposed to be with the deceased.

Q. All right. That is all the questions I have.

Cross examination by Mr. BROOKS:

I did not ask John Griffin any other questions. I did not hear him say anything further. I didn't know John Griffin personally. I had previously worked that area for approximately a year and a half to two years, and I knew him by name and

knew him when I saw him. I never had arrested him. I just had seen him around. I had no personal knowledge that he had a record. I was under the impression that he lived in the neighborhood, from my work in that area. It
[ROA 38] had been approximately a year and a half since I worked that area. I did not know anything about the reputation of John Griffin. On July the first, 1973, when I went to 1300 Branch Street, no one accompanied me. There were two other officers at the scene, Officer Baker and Officer A. C. Monday.

I did not have a face-to-face introduction to John Griffin. During the time I worked that area I tried to be familiar with as many people that lived in that area as possible, through contacts I had. I had seen him a number of times around Peacock's Grocery, which I frequently went by that location. I do not recall who pointed him out to me. To my knowledge, he has never been involved in any situation where I was present as an investigative officer. Other than John Griffin whom I found on the porch, I did not see any other evidence that there had been any kind of shooting. I did not see Charles McCoy there at the scene when I arrived. I did not have occasion to talk with him that day.

Mr. BROOKS. No further questions of this witness, Your Honor.

(Witness excused.)

Mr. CALDER. Your Honor, at this time I would move to introduce the photographs into evidence.

COURT. Any objection?

Mr. BROOKS. Your Honor, I would like the opportunity to approach the bench.

Mr. CALDER. Your Honor, may we approach at the same time?

COURT. Yes, sir.

(Counsel approach bench.)

COURT. Members of the Jury, you may be excused now until 9:30 tomorrow morning.
[ROA 39] 9-25-73 A.M.

COURT. I believe you had an objection?

Mr. BROOKS. Yes, sir. We do enter an objection to the two photographs on the basis that they depict the individual in a way other than the person about which the witness testified that he saw [sic]. The only reason for submitting it into evidence would be corroboration as to who the individual was, the identity of the person but the officer did not testify that he saw him in the condition depicted or that he ever saw him deceased in fact. I believe those photographs do show him deceased.

COURT. I assume that you may be planning to use them later, are you, Mr. Calder?

Mr. CALDER. Yes, Your Honor. Of course, the purpose for entering these photographs is to tie the doctor's testimony together with the other testimony in the case. I believe, the doctor reviewed the pictures.

COURT. I will reserve ruling then until you get to that point in the evidence. Let the jury come out, Mr. Mann.

(Jury returns to jury box.)

COURT. The State may proceed with its evidence.

Dr. Laurin J. Kaasa, being first duly sworn, testified as follows:

Direct examination by Mr. CALDER:

My name is Laurin J. Kaasa. I am a doctor of medicine licensed to practice in this State and by specialty, I am a pathologist and am presently director of the laboratory at Wake Memorial Hospital. I am a graduate in medicine of the University of Minnesota. Following a period in the
[ROA 40] army, I came back to the States and specialized in pathology at the Wayne County General Hospital, which is in the Detroit area of Michigan, where I specialized in training of pathology. I have been in the practice of pathology since 1947. I am licensed in this State of North Carolina (1961) and in Minnesota. I did my twelve months internship in St. Paul, Minnesota.

Q. Did you have some special training in the field of pathology?

A. Yes. I secured this at Wayne County General Hospital, which is in the Detroit area where I specialized in pathology for 36 months. Pathology is that branch of medicine having to do with diagnosis and discovering the cause of disease by use of various tests on the blood, body fluids, testing blood, testing body tissue to come up with a diagnosis by way of bacterial study, chemical studies and tissue studies and an occasional autopsy, which is the examination of the body after death.

Q. Now, Dr. Kaasa, on or about the 2nd day of July, 1973, did you have occasion to examine the body of one John Griffin?

A. I did. These are pictures of John Griffin. I also took pic-

tures of Mr. Griffin's body when I examined it. I have them with me. Aside from the pictures, I am able to identify the body as that of John Griffin because the deceased bore a tag which is attached to the body on which his name was stated.

I examined the deceased at the hospital morgue facilities, Wake Memorial, on the morning of July 2nd, 1973. In the left chest at about the level of the 7th rib, in the midchest—and I will point to my body here—approximately in this location—about the level of the 7th rib, there was a
[ROA 41] wound, a defect in the skin which was consistent with that type of wound made by a bullet. This is the only evidence of any external injury.

The pictures there accurately illustrate what I saw on the body that day.

The internal examination disclosed a considerable amount of blood in the abdominal space and Mr. Griffin had expired as a result of shock due to this voluminous blood loss. The blood was coming, leaking from a large scaping [sic] wound in the abdominal aorta, which is the main blood vessel within the abdominal space. The bullet had penetrated the aorta and the bullet itself was lying free within the abdominal cavity.

Q. Dr. Kaasa, are you able to identify this?

A. I am.

Q. And what is this?

A. This is a plastic envelope in which there is a lead bullet.

Q. And have you seen the bullet before?

A. I have.

Q. Where and when?

A. I saw and retrieved this bullet from the body of John Griffin on July 2nd, 1973. I might add that this handwriting on the outside is in my personal handwriting. I also identified the bullet by scribing [sic] my initial "K" on the base of the bullet.

Q. Dr. Kaasa, as a result of your examination have you been able to form an opinion satisfactory to yourself as to the exact cause of death of the deceased?

A. I have.

Q. And what is that opinion?

A. That Mr. Griffin expired from shock as a result of voluminous, massive blood loss within the abdominal
[ROA 42] cavity due to leakage from a penetrating wound of the abdominal aorta.

Q. And was that wound caused by that bullet in your opinion?

A. It was.

Mr. CALDER. All right, that is all the questions I have.

Cross examination by Mr. BROOKS:

I indicated that I identified the body primarily from a tag that was attached to the corpse. I do not know who identified the tag to the corpse or attached the tag to the corpse. I have no other way of identifying the corpse, other than my recollection as to the pictures here at the present time, of course.

Q. Well, you are saying though, that the pictures are of the corpse that you examined, is that correct?

A. That is correct, yes, sir.

Mr. BROOKS. No other questions of this witness, Your Honor.

COURT. Anything else, Mr. Calder?

Mr. CALDER. Thank you, Dr. Kassa.

(Witness excused.)

Detective D. C. Williams, being first duly sworn, testified as follows:

DIRECT EXAMINATION

I am Detective D. C. Williams, Raleigh Police Department. No. I did not see the defendant on July 1, 1973, but I did see him on July 2nd in the magistrate's office in the basement of this building. He was with Sylvester Jones. At
[ROA 43] that time, I was interested in talking to Mr. Fowler. Before talking with Mr. Fowler, I advised him of his constitutional rights. I had a form with me which I read to Mr. Fowler. It states: "Your Rights." Says before we ask you any questions, you must understand your rights. You have the right to remain silent and not make any statement. Anything you say can and will be used against you in Court. You have the right to talk to a lawyer for advice before we ask you any questions or have him with you during questioning. If you cannot afford a lawyer, one will be appointed for you by the Court before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer. Waiver of Rights. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me by anyone. This was

read to Mr. Fowler by me. It was also handed to him to read for himself.

After reading this, I asked him did he fully understand his constitutional rights and understanding them, did he want to make a statement now without a lawyer. He stated that he would. He signed this form. This form was witnessed by Sylvester Jones and myself.

Q. All right. And did you subsequently question Mr. Fowler?

A. Yes, I did. Sylvester Jones was present the time I questioned Mr. Fowler.

First of all, Mr. Fowler advised me that he wanted me to know and understand that when he shot John Griffin, he was drunk. He told me that he had gotten drunk on
[ROA 44] Saturday night. When he got up around 11:00 a.m. on Sunday, he had started drinking again. Stated since Saturday night he had drunk approximately sixteen beers, one pint of scotch, approximately one quart of wine; that after he had gotten up on Sunday, he want to Sylvester Jones' house, started playing dice. Shortly after he got there Sylvester Jones got up and went to the bathroom and left ten dollars lying on the floor; that when Sylvester returned, it was gone, the ten dollars on the floor. When Sylvester returned an argument started between Jesse and John Griffin over the ten dollars. Said northing resulted from this argument.

After they left Person Street where Sylvester Jones lives, Jess Fowler and his wife went to King's Lounge on Rock Quarry Road sometime around 6:00 p.m. After they had arrived there, John Griffin and Sylvester Jones came in and started drinking beer. Said Jesse went to play a record on the juke box and John Griffin came over to his table and wanted to start an argument again in reference to the ten dollars at the dice game.

John Griffin asked Jesse Fowler to come outside and to fight him. Mr. Fowler stated that he went outside and just as soon as he walked out the door, John Griffin hit him in the face, knocking him down and causing his nose to start bleeding real bad. Sylvester Jones at this time came over and stopped the fight and that Jesse Fowler and his wife went home. Stated at this time he had a .38 caliber pistol in his pocket with him. After going home and staying a few minutes, he headed for Walnut Terrace to see a friend.
[ROA 45] arriving at Lenoir Street. When he got to Lenoir Street, Ronald Dolby picked him up

and drove him to Walnut Terrace and they got to Branch Street; they saw John Griffin again on the sidewalk. Stated John Griffin came over to the car, opened the car door and wanted to fight him again. At this time, he told Dolby to let him out of the car so he would not get into any trouble. Stated that he started walking away and John came after him.

When John came after him, this is Mr. Fowler doing the talking—I turned and shot at him and missed. I then shot at him again and hit him. I dropped the gun and walked away. I went to Wilmington Street and walked around for a while and then went home. I told my wife what had occurred and remained at home. Sylvester Jones came to my house and told me that John was dead and I told him that I had shot John with my gun, a .38 caliber. Sylvester advised me to give myself up and not to run. We went then to the Sheriffs office, where Sylvester asked the sheriff to call you. Referring to me.

Two officers from the police department came in and served a warrant on me while we were waiting for you. At this time, I am high off beer and wine, but I know what I am doing and I am in my right state of mind.

The waiver of his rights was signed, read and signed by him at 2:20 a.m. This would be on July 2, 1973. His condition at that time was pretty much as it is now with the exception of his eyes were real bloodshot. I have got photographs that I took of him that morning. There was also a laceration on his nose. As a result of that, he was carried to Wake Memorial Hospital for treatment and was advised by the attending physician that the nose was broken. There was no blood on his shirt.
[ROA 46] He advised me that the clothes that he had on at the time when he first got in the fight were taken off and thrown away at his home. Yes, I smelled the odor of intoxicants on his breath. I wouldn't say his speech was impaired. He appeared to me to be in complete control of both his mental and physical faculties at the time I interviewed him.

However, there was some odor of intoxicant on his breath and his eyes were bloodshot.

I did not find the gun. I do not have any information that the gun was found.

Q. What did you understand—strike that. Repeat what you said about what Jesse Fowler told Ronald Dolby as he got out of the car.

A. Told Mr. Dolby to let him out of the car that he didn't want him to get into any trouble.

Q. Who is him?

A. Referring back to Dolby.

COURT. Mr. Williams, while we are at that point, would you go ahead and relate what you said that he said from that point on through the time of the shooting, please?

A. When we got to Branch Street, I saw John on the sidewalk. He came over to the car and opened the door and started to fight again. I told Dolby to let me out so he would not get into any trouble. I started to walk away and John came after me. I turned and shot at him and missed. I then shot at him again and hit him. I dropped the gun and walked away. I went to Wilmington Street——

COURT. That part answers my question. You may go ahead Mr. Calder if you have any more questions.

Mr. CALDER. I believe that is all the questions I have.

[ROA 47] Cross examination by Mr. BROOKS:

I never knew John Griffin. I received a phone call at my home approximately 1:15 a.m. on July 2nd from Sylvester Jones in reference to Mr. Fowler requesting that I come to the magistrate's office to meet him. I first met them, it was approximately 2:10 a.m. in the magistrate's office in the basement of this building. The statement that I referred to a few moments ago, is a statement of the defendant as written by me. He did not sign the statement. We went over the statement twice and corrected it as he wanted it.

Mr. BROOKS. No other questions of this witness, Your Honor.

(Witness excused.)

Mr. CALDER. Your Honor, at this time I would move to introduce the photographs into evidence.

COURT. Which ones, Mr. Calder?

Mr. CALDER. I would like to introduce all of them.

Mr. BROOKS. We will object, Your Honor, on the grounds that they would be prejudicial.

COURT. Let me see them, Mr. Calder.

(Hands photos to Court.)

COURT. Objection overruled. They may be admitted.

Members of the Jury, these photographs which may be exhibited to you are to be considered by you as they explain and illustrate the testimony of the witnesses who may have referred

to them and not as substantive evidence. You may, if you like, pass them along.

[ROA 48] *Jonice Marlene Griffin*, being first duly sworn, testified as follows:

. Direct examination by Mr. CALDER:

My name is Jonice Marlene Griffin. My nickname is Tingaling. I am eleven and am in the seventh grade at Carnage Junior High. There are five children in my family. There is one younger than me, and that is Paula sitting right here behind you. She is nine. All five of us live over on Branch Street with our mama. I remember back on the first day of July of 1973 when my daddy, John Griffin, came over to see us. No one was with him. When he got there, he just asked mama could we walk around the corner with him, and me and my little sister, Paula, went walking with him. We walked up toward Mrs. Raines' house, at the corner of Holman Street and Branch Street. My daddy was talking to Mrs. Raines and then my cousin Ronald Dolby drove up and then my daddy snatched the car door open and my cousin said: "Don't snatch the car door open no more", and then just shut it and drove off.

And then after a while Jesse jumped out of the car and went back down the street, and shot my daddy. My daddy was hiding behind Charles McCoy. And then my daddy came up and he shot him. I did not see the gun before he shot. He shot once. I heard the gun go off twice. Then I ran around the corner back to mama. I did not see where Jesse went. I did not hear my daddy say anything to Jesse before the shooting. Jesse did not say anything to me before the shooting. He spoke to my sister for just a minute.

Mr. CALDER. That is all the questions I have.

Cross examination by Mr. BROOKS:

I do not remember what time of day I first saw my father that afternoon on Sunday, July the first. I was outside playing when he came. When I first saw him, he was

[ROA 49] in a car, but he was not driving the car. I do not remember who was driving the car. I had not had anything to eat that evening. It was almost dark.

It was turning dark about 8:25. But I saw my father a little earlier than that. I do not know how long before 8:25 I might have first seen my father. The car that my father got out of stopped in front of the house at 1338 Branch Street. We walked down to Holman Street. I was on the corner when I first saw

my cousin and his car; he was coming around the corner. The car did not stop there at the corner. It drove up from the corner. It was in the street; my father went out into the street to pull the car door open.

When the car door was closed, Johnny Dolby drove on. The car stopped again in the middle of the block. The defendant got out of the car and my father went on walking up the street toward Holman Street. I did not see cars parked on the south side of Branch Street. I saw my father hiding behind McCoy. McCoy was walking toward his house. My father was walking behind him, crouched down. McCoy was coming down off the curb when my father was crouched behind him.

I was going to run around the corner where Branch Street turns. I was not between the defendant and my father. I was between my father and Holman Street. I saw my father get behind Mr. McCoy when Jesse came out of the car. At that moment it stopped and he was getting out. My father got behind McCoy, and started tipping behind him.

COURT. Did what?

A. Tipped behind Charles, yes, sir.

He did not have anything in his hand. My father tipped behind McCoy about two car lengths. McCoy
[ROA 50] was walking very slowly. Slower than I would walk. We were closer to Highway 401 than Holman Street. Mrs. Raines' house was all the way down the street. I don't know how many different apartments away from Mrs. Raines' I was. I was looking at my father when he was shot. McCoy was not in front of me. McCoy had turned around, too. He was going on up the street and then when he heard a shot, he turned around and looked. I did not see my father run into McCoy. I did not see the defendant after the shooting. The minute the gun was fired, I ran on home. My sister did not go with me to the house.

Mr. BROOKS. No further questions of this witness, Your Honor.

(Witness excused.)

Paula Griffin, being first duly sworn, testified as follows:

Direct examination by Mr. CALDER:

Paula Griffin is my name and I am nine. I go to school at Carnage and am in the Fourth Grade. I was with my sister Jonice and my daddy down close to Mrs. Raines' house on the day we are talking about. I don't know how long daddy had

been over there at our house or in the neighborhood at that time.

It was still light and I saw Ronald come driving up. He came up a little bit close and then he stopped in the street and my daddy went to the car and snatched the door open and he said, "Don't snatch the door open no more and he closed it." [sic] I heard my daddy say, "I don't want to fight you no more," and then Johnny, he just drove up the street. I knew Jesse Fowler at that time; I had seen him before. He was the one that my daddy was talking to. Jesse did not have anything to say. Ronald drove on up the street. I did
[ROA 51] not see him stop again. I did not see Jesse Fowler again until he came down the sidewalk.

A. And I was going up there to the hill on the sidewalk and he just came down there pass [sic] me and asked me where my daddy was at. I said: "I don't know." I did not see a gun at that time. Then he went down there and then he stepped off the curb and then he just shot him. I just stood there and looked. Jesse went on the other side of the street and walked up the sidewalk. Daddy fell and then he went over there on the grass. I did not hear Jesse say anything else to my daddy. I did not hear daddy say anything else to Jesse. At the time that Jesse stepped off to the side, Daddy was coming up close behind McCoy.

My mama came around the corner and got me.

Cross examination by Mr. BROOKS:

I first saw my father that afternoon at my house. I was outside. It was somebody driving but he won't [sic] driving. I went to walk with him around to Holman Street. Ronald Dolby is my cousin. He is also known as Johnny. I saw Johnny stop in the middle of the street. But he was almost at Holman Street. Daddy snatched open the door and my cousin Johnny said, "Don't snatch it open no more ["] and he closed it back. I was standing right there on the curb at the time. I went up close to the hill and stood. It is a little hill on Holman Street where they put the dirt on the sidewalk. I was there when my cousin stopped the second time. I stayed there throughout from that time until the shooting occurred.

I know Jesse Fowler. I don't know how long I have known him.

Q. You have known him two years.

A. Yes.

I do not know anything about his reputation.
[ROA 52] He has been to my house before but not many times. I don't know how long had it been since John Griffin lived at my house. My father lived in Goldsboro. I do not know whether or not he has ever been in jail.

Q. Had your father ever been convicted of a crime?

Mr. CALDER. Your Honor, I object.

COURT. Objection sustained to that question.

Johnny Dolby was living at my house. I do not know how long he had been living there. After the shooting, I saw the defendant cross to the north side of the street. He went up there through that path under the bridge, under 401. He was walking all of this time.

Mr. BROOKS. No further questions of this witness, Your Honor.

(Witness excused.)

Mr. CALDER. Your Honor, I believe I neglected to introduce the bullet into evidence. I would like to do that at this time.

COURT. It may be admitted.

Mr. CALDER. That is the evidence for the State, Your Honor.

Mr. BROOKS. I would move for a dismissal at this time at the close of the State's evidence.

COURT. Do you care to argue it, Mr. Brooks?

Mr. BROOKS. No, sir.

COURT. All right, motion denied.

Mr. BROOKS. Note an exception, Your Honor.

DEFENDANT'S EVIDENCE

[ROA 53]

COURT. Evidence for the defendant?

Mr. BROOKS. Yes, Your Honor.

Connie "Doc" Holliday, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS:

My name is Connie "Doc" Holliday. Doc is not my nickname, that is my given name. I live at 2816 Sylvester in Kingwood Forest in the eastern part of Raleigh. I know the defendant. I saw the defendant on June the 30th, a Saturday, 1973. We had planned a fishing trip. This buddy of mine he has a boat and we had planned to go fishing that Sunday afternoon but I didn't get around to making it because my mother had to go to the hospital and my wife was out there visiting her. The defend-

ant and I had been fishing on several occasions during the summer. We go down to the Neuse River and we knowed several ponds, privately owned ponds, and we go down there and fish.

Q. What do you carry fishing with you when you go fishing?

A. Well normally I carried a .22 automatic to shoot snakes with. The defendant carries a handgun when we go fishing; it is between a .32 and .38 caliber. He carry tackle with him. Others were going fishing with us. Wilbert Carter and several of us were going. When I first saw the defendant on June the 30th, on the Saturday, it was kinda early in the morning. I guess it was about 10:30. I saw him later on that afternoon. I guess it was about 4:30. We was still talking about fishing but I told him I wouldn't be able to get away and if they were continuing to go on fishing—I mean, it would be all right. I would still try to get the boat for them. I saw the defendant on Sunday, July the 1st, 1973. Oh, I guess it was about, it was after 4:00 o'clock in the afternoon when I saw him.
[ROA 54] We were still planning to go fishing that day. My fishing gear was in the car. The defendant had one rod and reel and I think a cane pole he had with him in the car. I saw him down in Southgate. That is about two and a half to three blocks from where he lives.

A. I had planned to pick him up on Sunday to take him fishing.

A. At the time I saw him, yes, I'd say he had a pistol with him.

I didn't pick him up at that time. I stopped in the King's Lounge and was talking to some of the fellows that was there and I never did pick him up to take him. I didn't have the car all that Sunday afternoon because my wife she had went out to the hospital, and actually, I was waiting on her to return and then we was going on fishing. I was over to Wilbert Carter's house. He lives across the street. So I told her to pick me up at Southgate on the way from the hospital. I went down to the basketball court with them and they played a little basketball in the little mini park they have over there in Kingwood.

I know John Griffin. I couldn't say whether or not he got in a lot of fights.

Q. Did he have what you call a big mouth?

A. Well, he talked quite frequently.

I last saw the defendant on Sunday, the first of July, 1973,

about 4:00 o'clock. Maybe between 4:30 and 5:30. Something like that. I don't know what it started about. So I can't say what actually happened but I know him and John got in a little scuffle there by the lounge. I was there sitting out there on the bank.

[ROA 55] A. I was sitting across the parking lot on a little slope near a fence. I saw the scuffle. Oh, it didn't last but about five or ten minutes. Might not have lasted that long because it was broken up, by Mr. Jones. When I last saw the defendant I was still planning to go fishing, but after they, this little argument developed—I didn't tell them I wasn't still intending to go but I had thought of it after that, that little argument that I would just call the whole thing off, but I hadn't told them anything about it yet. So far as I knew, the defendant was still planning on going fishing with me. I have been knowing the defendant ever since about 1963 when I first came out of the service. I would not characterize him as a violent type person.

Mr. BROOKS. No further questions of this witness, Your Honor.

Cross examination by Mr. CALDER:

A. I didn't see Mr. Fowler and Mr. Griffin inside of King's Lounge. I only saw them on the outside. I saw them when they first walked outside but I wasn't aware what was going on. They just walked out and that is when it started. I wasn't paying too much attention to them because I didn't know they had actually been engaged in an argument on the inside. I saw the first lick when it was passed and that was about it and they scuffled around a while. I didn't become involved in it. A few fellows was standing around. I did not know at that time what they were fighting about. I was not at the dice game.

I saw the defendant earlier Sunday morning at Kwik-Pik and also saw him Sunday afternoon at the basketball court and at King's Lounge just before all of this happened, but after the little scuffle there in the parking lot. I didn't

[ROA 56] see Jesse anymore. I saw him three different times that day.

I work for Car Beauty Center. Defendant is a pretty good basketball player. He played kind of good. He played for between 45 minutes and an hour. This was about 3:30. I did not see how defendant go away from the King's Lounge. I don't know whether he walked, caught a ride or what happened. I have

never been in a fight with Jesse Fowler. I have never been in a fight with John Griffin.

Q. How long had you known John Griffin?

A. I met John Griffin about the same time that I learned [sic] defendant. John was a few years older than the defendant. I knew defendant when he was maybe 17 or 18 years old. This was when I first got out of service.

The gun I had seen on several occasions in defendant's home and each time that we went fishing he had it with him. I would say it was the same one. I never heard defendant express any great attachment to that particular gun. As far as I knew, it was just a regular gun.

Mr. CALDER. That is all the questions I have.

Mr. BROOKS. Redirect, Your Honor.

Redirect by Mr. BROOKS:

I saw defendant about ten on Sunday morning before the Kwik-Pik had closed. I think he came down there to pick up something for his wife.

His fishing gear was already in my car on Saturday. I did not carry him anywhere on Sunday morning.

Mr. BROOKS. No further questions, Your Honor.

(Witness excused.)

[ROA 57] *Sylvester Jones*, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS:

My name is Sylvester Jones. I live at 522 Person Street. I have known the defendant since '63. On June the 30th, 1973, I saw the defendant at King's Lounge, on a Saturday. I do not remember what time of day it was. I see him up there on other days.

That particular Saturday, we were discussing going fishing. I was going out Lake Wheeler or either Turf Grass. That Friday night I had planned to go with a friend of mine named Delmar because we usually go fishing every Saturday. It so happened that Saturday he didn't come by. So I left and went up to the King's Lounge and we were just planning to go to Lake Wheeler or either Turf Grass. Anywhere we thought the fish were biting at. We had not planned any special time to go fishing on Sunday. I didn't leave King's Lounge with defendant. I don't know what time I left. I saw him on Sunday, July

the 1st, 1973. I don't know what time it was. I do not recall what time I got up on that Sunday. Sunday morning I went to play basketball at the mini park on Lenoir Street. Emory Brooks, Johnnel Brown, Swade Archibald, a guy named Skin, his brother Puddin' and John Griffin were with me. I forgot who the other person was.

John Griffin did not play any basketball; he went to sleep. The defendant wasn't down there at the time I got there. I did not see him earlier that Sunday morning. We got ready to leave after playing our last game and that is when defendant came up. Somebody was with him when he came, but I forgot who it was. I was planning to go fishing with him later that day. When I go fishing, I carry a gun with me for snakes. Most of the people going fishing with me carry a gun to shoot snakes with. The defendant carried a gun with him
[ROA 58] when he would go fishing with me. He generally carried a .38. I am not sure. I cannot recall ever seeing him shoot a snake.

At the time defendant came to the basketball court, we was drinking water and some guys still out on the court. We were through playing. Then I went home. Mostly everyone down there playing basketball with us went to my house. The defendant came to the house about five or ten minutes afterwards. I don't know where he had went to because we was talking about getting some cards and playing Bid Whisk. Couldn't find no cards because the store was closed.

The basketball court from where I live is about six or seven blocks. When we got to my house, we sat around and waited to see if we could get some cards, then we started drinking beer and started shooting some dice. All of us was shooting dice for money. When defendant came, we was already shooting dice. And so he kneeled down beside of me and so at the time I had the dice, so I was shooting. So I had to go to the rest room because I had been drinking a lot of beer. So I left my ten dollar bill on the floor and told defendant (Jesse) to keep an eye on it for me. When I came back, my ten dollar bill was gone. I asked who had my money. At first didn't nobody say nothing. So I stood up—after I kneeled down, I stood up. I told them like I wasn't playing. I want to know where my money was.

About that time defendant told John Griffin to give the money to me. Then John Griffin slid the money back across the floor to me. I don't know if it was under his foot. Griffin

told defendant that he didn't have to steal. That I would give him anything he wanted. I don't know if he would try to steal it or playing or what but he gave the money back to me and so when I got the money back, I started back
[ROA 59] shooting dice. There won't [sic]no argument. I don't recall John Griffin saying anything else to the defendant after I got my money. I do not recall anything else that the defendant had to say, except, he told me that he was fixing to leave and asked me for a dollar. I told him that I would be out at King's Lounge later on and I would give it to him. That I couldn't give it to him now because I was gambling. I don't remember what time it was when we finished. It won't [sic] too long because w:.n't [sic] too much money around the table. It was in the afternoon. Exactly what time, I don't know.

When I got through shooting dice, I told Johnny I was going to take my bath and was going out to the King's Lounge and that I wasn't going to stay long because I was going to take my girl friend to the movies. I went and took a bath and John Griffin and myself and another dude named James—I forgot his name. I haven't seen him in about three months, we caught a cab and went out to King's Lounge. When we got there, I ordered a pitcher of beer to sit on the table. I don't know what time I got to the King's Lounge. It was in the afternoon.

When I got to the King's Lounge, I saw the defendant as I walked in because he came up on my side and asked me for the dollar. So I gave him the dollar. Then I went and got my pitcher of beer and sat it on the table. John, a dude named James, were at the table where I sat down. I don't know if John Griffin saw defendant because he was behind me. He had to see them then. The defendant went to the record player after I gave him the dollar. When the defendant came by the table and John Griffin called him over to the table and told defendant if he pulled that shit like he pulled this morning, that he was going to kick his ass. So defendant told him
[ROA 60] that he wasn't going to do nothing to him. John then invited defendant on the outside.

A. When John invited him out, John went out the door first. Defendant came behind. When they got outside, John turned arcund and hit defendant and knocked him down. I was the third one to go outside. John Griffin hit defendant in the face somewhere. When he knocked him down, I don't

know if he kneed him or kicked him, but his nose started bleeding then. That is when I broke it up. Defendant went on the side of the building. I don't know where he went. I didn't see him no more. John Griffin came up to me then and asked me for my pistol. He knew that I had a pistol. At the time, I did not have it on me. So I told him, you know, I couldn't do that. So I told Mr. Hodge would he take John back across town. I did not see John Griffin again that day because when Hodge took John across town, I went and got my girl friend and we went to the movies.

Q. Was John Griffin staying at your house?

A. He wasn't exactly staying at my house. He had a room around the corner but he had not paid his rent in about a week or two and he spent a couple of nights around there. Which I wouldn't say exactly that he was, you know, a permanent resident. My address is 522 Person Street. I think John Griffin lived on Lenoir Street. I do not know in whose home he was rooming. I lived about three or four houses from where Griffin was living. I have an aunt who lives about three houses from where John Griffin was living. The houses are close together. John Griffin had spent a couple of nights there, too. I wouldn't say that he was staying anywhere he could find a place. Like I say, he had a room around the corner. He had just got a job. His payment on his room wasn't exactly kept up, you know, because most of the time when he got a check
[ROA 61] he would go see his children, you know.

At the time I didn't pay no attention as to whether or not the defendant had his pistol with him that day. When John Grifffiffin asked me for my pistol after the fight, I do not know whether the defendant was in sight then. I think the defendant had on a pair of blue short pants that day. I won't paying that much attention. I don't know if he had on shoes or tennis shoes or barefooted. I don't know. I do not recall what kind of shirt he might have had on.

Mr. BROOKS. No further questions of this witness, Your Honor.

Cross examination by Mr. CALDER:

I saw the defendant sometime either real late Sunday night or early Monday morning after I came from the movies. I took my girl friend home, which they stay almost next door to each other. My girl friend—is her brother. You know, were brothers and sisters.

COURT. Your girl friend is Jesse's sister?

A. Yes, sir. See, when I left the movies, it was raining, drizzling a little bit. So I walked down to my house. When I got to my house and went in there wasn't anyone there. So we came back on the porch and was sitting on the porch until it slacked up.

About that time Johnnel Brown and his girl friend came by. He asked me did I know John was dead. I told him, "No," because I had just left the movies. I had not seen Jesse at that time.

A. And so I told him if he could take my girl friend home, I could find out, you know, if it was true. Like I say, they stay about two doors from each other. When they took us home—my girl friend home—she went down, you know,
[ROA 62] and asked his wife and she said, yes, defendant was in there then. His wife and children were there. Jesse's sister asked them if John was dead. I talked to defendant. I didn't ask him exactly what happened, you know, like I was trying to find out what he was going to do. You know. He told me that he had shot John. He said that he wanted to turn himself in, but in a way, he was kind of scared. I told him, my girl friend told him and his wife told him that he ought to. I reckon this was after midnight; I don't know. I did not ask him why he shot him. He did not say why he shot him. I went with him to the magistrate's office. I don't know if his mother drove or who drove. Somebody in the family drove. About five or six of us went down I believe. I didn't call the police until I got to the sheriff's office.

I was present when Mr. Williams questioned the defendant. I had never known Jesse and John to fight before that day. I had never had a fight with Jesse.

Q. Had you ever had a fight with John?

A. Not exactly fight, no. I won't [sic] exactly mad about the ten dollars, but I didn't want to lose it because it was the only one I had. After I got my ten dollars back, it didn't seem like they were mad, you know, I got my ten dollars back. Nobody didn't say nothing. Just got on back down and started shooting dice. Jesse didn't say nothing nor John say nothing.

Q. At the time John invited Jesse outside from the King's Lounge—were they hassling about that same ten dollars or something else or do you know?

A. Like I told you, when Jesse came by the table, John told him if he did—like I said, if he do it again, what he did this

morning, you know, what was going to happen. I reckon he was referring to Jesse saying that he had the ten dollars. That is the only thing I could recall, you know. That
[ROA 63] is the only thing they had words about was that ten dollars.

James, this other man that was with us at the table, used to stay with me and he got behind in his rent. He owed me $30.00 and I hadn't seen him.

I did not in fact have my gun when John asked me for it. Defendant said nothing to John to make John think that he needed to have a gun, after I broke the fight up.

Mr. CALDER. That is all the questions I have.

Mr. BROOKS. Redirect, Your Honor.

Redirect by Mr. BROOKS:

The defendant and John Griffin had been friends.

Q. You indicated in response to the solicitor's question—he asked you had you ever had a fight with John Griffin and you said not exactly. What sort of conflict, if any, had you ever had with John Griffin?

A. We had an argument. I don't know if he was jiving or serious or what, you know. Seem like most of the guys that I hang around with, be around my house at the time, something will be done and say something. We don't know if they want to fight or what. John Griffin and I had arguments, over money, over girls—things like that. Like he did get in a lot of arguments. Like I said, I don't know if he was serious or what, you know. Like you can half understand. You don't know if he is serious at times or what, you know. He like to talk a whole lot. He would shoot a lot of bull. I was not afraid of John Griffin.

Q. Did you take much of what he said seriously?

A. All depends on what, on how I was. If
[ROA 64] I was sober, I would look at him and laugh but if I had been drinking and half mad myself, I didn't take it.

Mr. BROOKS. No further questions, Your Honor.

(Witness excused.)

Mrs. Vasti Fowler, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS.

Vasti Fowler is my name. I live at 1813 Liberty Place. The defendant is my husband. We've been married about three years. We live about a block from King's Lounge. It is on Rock Quarry Road outside the city limits. On Sunday, July the first,

1973, I got up about 8:30. The defendant was at home at the time I got up. I prepared breakfast when I got up, about 9:30. The defendant was up at that time. He didn't have breakfast. He left the house about quarter past nine or something like that.

I got dressed and went to church about quarter till ten or 10:00. After church, I came back home, undressed and went and picked up Doris Clacks. She lives about a mile from me. When I went to pick her up, I had my children; one is three and the other one is six.

Then I drove back dow.. to the Kwik-Pik store yard. The Kwik-Pik is in the same building with the King's Lounge and there is a Cleaner's in between it. I drove up and Jesse saw me as he was coming out of King's Lounge. I didn't get out of the car. No one went in the Kwik-Pik. When he came over, he asked me to come over to the King's Lounge and drink some beer with him. It was about three o'clock, I think. No one was with Jesse. I told him that I would have a
[ROA 65] beer after I took my boys home. Doris went with me to take the boys home. I left the car there and walked back with Doris. I returned to the King's Lounge about twelve or fifteen minutes later. Jesse was inside when I approached the King's Lounge. We went in and sat down and he ordered some beer and I started drinking beer. Jesse and Doris were at the table where I was seated. We just sat and talked for about two hours.

I didn't know John Griffin, but I remember when Sylvester came in. I know some more people were with him. Sylvester arrived close to five. From the time Sylvester and those came in it seemed about twenty minutes or so before Jesse got up from the table. After Jesse got up, I heard some loud talking and I looked back and they was just talking and I thought nothing else about it until I heard someone say, come on outside.

A. So, Griffin went outside first and Huck went out behind him. I did not get up right then because I just thought they was just talking, you know. And so then I decided I would get up to peep at Jesse through a large glass door. When I peeped I saw Jesse lying on the ground and Griffin was over him with one hand on his neck and his knee was up along in here and Jesse was just lying there. I stepped outside the door and Sylvester was pulling Griffin's arm back off Jesse.

A. And then Jesse got up and he was bleeding and I told him to come on. He had his head down and he was mainly just mak-

Direct examination by Mr. BROOKS.

Doris Marie Clacks is my name. The defendant is my brother-in-law. I married his brother. I live at 2024 Waters Drive which is about two miles from King's Lounge. On July the first, 1973, I was living at 713 Rock Quarry Road which is a mile or so from the King's Lounge. Mrs. Vasti Fowler came and picked me up on July 1, 1973 and we went back to her house. We didn't stay there too long. We walked to the King's Lounge. It was about 3:00 p.m.

A. Well, I guess I stayed at the King's Lounge about an hour and a half. I saw the defendant there. We drank some beer. Vasti and Jesse were at the table. Defendant got up from the table and he was going to the bathroom. On his way to the bathroom, I saw something sticking in his right-hand pocket, that looked like a gun and he pushed it down like that and went on to the bathroom. He came back to the table where we were sitting at. I don't know John Griffin. I wasn't at the King's Lounge at the time any fight occurred. I left the King's Lounge about 4:30 or 5:00. I did not see the defendant anymore that day.

Mr. BROOKS. No further questions of this witness, Your Honor.

[ROA 68] Cross examination by Mr. CALDER:

A. I could see the handle of the gun. And after he pushed it down, I don't think the handle was showing.

Mr. BROOKS. You may be excused.

(Witness excused.)

James McIntosh, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS.

My name is James McIntosh. I live at 1618 Fountain Drive, Raleigh. I am self-employed as a carpenter. I have known the defendant approximately three years. I first saw the defendant I say around 4:30 or 5:00 o'clock on July 1, 1973, when I was on my way to work in King's Lounge and they were on their way out. I was selling beer at the King's Lounge.

I don't recall seeing the defendant return to the King's Lounge after that first meeting. I observed the fight between the defendant and John Griffin about 4:30 or 5:00 o'clock when I was on my way to work. Well, they were coming out of the door and I was trying to get in. So all of a sudden—John Griffin hit him. I didn't know John Griffin. They just scuffled after that until Sylvester broke it up. I saw him go around the

ing steps. So I pulled him away from the crowd sort of and I told him to come inside and let me clean him up and he just said, "No, I will be all right." And he was still bent down bleeding. I was standing there with him and I repeated for him to come inside so I could help clean him up and by this time I heard somebody ask for a gun beside me
[ROA 66] because Jesse and I were standing on the corner of the building and I heard somebody ask for a gun and then I told Jesse, I said, "Come on, let's go home." And I went back inside the King's Lounge and got my bag and cigarettes off the table and I went home. Jesse didn't go home with me.

A. I left him standing on the corner. I saw Jesse again that day about 8:30 or 9:00 p.m., on the corner of Lee and Blount Streets. He had called for me to come and pick him up there. He called about 8:25. When I went to pick him up, his brother, Maurice, was with me. I then started back home and Jesse told me to stop at the King's Lounge. I let the defendant out there and went home.

I next saw the defendant that day it seems like about an hour or thirty minutes later at home.

I fixed him dinner. I had already had dinner. He had baked chicken and string beans and potatoes. I can't recall talking with him while he was eating. Defendant stayed at the house for the rest of the evening.

A. Later, I carried him to see his mother and then I brought him down here to turn himself in. He wanted to see her before he turned himself in. Jesse told me when he called me on the phone to come and pick him up that he thought that he had shot John and wanted me to pick him up.

I drove him down to the police station arriving about 1:30 a.m.

A. I was at the police station until the detective carried him to the hospital after 2:00 a.m.

I didn't ask the defendant why he had shot John Griffin. He never told me why he had shot John Griffin.
[ROA 67] I was just blank.

Mr. BROOKS. No further questions of this witness, Your Honor.

Mr. CALDER. Your Honor, I don't have any questions for her.

(Witness excused.)

Doris Marie Clacks, being first duly sworn testified as follows:

building. Where, I don't know. I asked Nathaniel Bud Hodge to take John Griffin home. I didn't want any more trouble in front of the place. John Griffin got in the car with Bud Hodge. After that, I went inside and went to work. I don't remember seeing the defendant again that day.

Mr. BROOKS. No further questions of this witness, Your Honor.

Cross examnation by Mr. Calder:

John Griffin got the best of the fight.

[ROA 69] Mr. CALDER. That is all the questions I have.

(Witness excused.)

Charles Gene Rogers, being first duly sworn testified as follows:

Direct examination by Mr. BROOKS:

Charles Gene Rogers is my name. I stay at 412 East Lee Street. I have known the defendant about 15 years. My wife was in school with the defendant. On July 1, 1973, I was coming out of the Kwik-Pik. I went in there and got some groceries and I was going to my car which was parked in front of a laundry, a cleaners—dry cleaners which is next to the lounge. They call it King's Lounge and as I was going to my car I saw John Griffin come out of King's Lounge between 5:30 or 6:00. I had known John Griffin about twenty years.

Then I saw John Griffin turn around and it appears that he hit somebody. When I got up close, he was down on him with his knee, seemed like he kneed him, too, after he hit him and so I didn't stop to see what it was. I was going to my car and a fellow pulled John Griffin off of this fellow but at the time I didn't know it was Huck. I didn't know Huck was on the ground because I couldn't see who John Griffin hit. Then as he was pulling him, Huck went around the building holding his head down, which I still didn't know it was him and then John Griffin told the fellow that had pulled him up to let him have a pistol that he was going to kill—well, he used some foul language at the time and he asked him a couple of times for his pistol. So I got in my car and as I was going around the King's Lounge, going out, I seen that it was Huck. Then I recognized it was Huck and I told him, I said, "Man, you better go ahead

on because John Griffin is trying to get a pistol

[ROA 70] to kill you." And I was going on out the driveway and he was coming on around behind the King's Lounge. I did not see John Griffin leave. It appears

that the defendant was leaving because we was coming behind me walking as I was driving. He was walking toward Rock Quarry Road. He was going through the project like going to Rock Quarry Road. I did not see the defendant any more that day.

John Griffin was prone to get involved in fights. I have been knowing John Griffin a pretty good while. He had a lot of fights and a lot of arguments. Well, I would say he could cause some danger, he had a big mouth. Well, I didn't take seriously what he said because I have been knowing John [sic]. I know that he always runs off at the mouth and continues to get whopped a lot by his mouth.

Mr. BROOKS. No further questions of this witness, Your Honor.

Cross examination by Mr. CALDER:

After I told Jesse that he had better get away from there that John was going to get him with a gun, he said, "Okay, I am going." He still had his head down and at that time it appears that two people was coming out of the back door of the King's Lounge, you know, and he sort of hesitated and then when I seen him as I was coming out of the driveway he was coming on back around King's Lounge. He didn't say anything to me about a gun that he had. I don't know whether he had a gun but he had a knot in his pocket. I don't know what it was. I was not afraid of John Griffin.

Mr. CALDER. That is all the questions I have.

Mr. BROOKS. No further questions, Your Honor.

(Witness excused.)

[ROA 71] COURT. You have already been sworn to testify and are still under oath.

Johnny Fraizer[2] *Dolby*, being called by the defendant, testified as follows:

By Mr. BROOKS:

Johnny Fraizer Dolby is my name. On July the first, 1973, I picked up the defendant and took him to Walnut Terrace.

Q. We have a blackboard. Would like for you to demonstrate the street, the shape of the street where you took the defendant.

A. Yes, sir.

Mr. BROOKS. With the Court's permission, would like for him to come around and indicate on the drawing.

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[2] This witness' middle name is spelled "Frazier" at p. 13, *supra* [ROA 22].

COURT. All right.

Q. There is already a facsimile up here. What I want to ask you is whether or not this looks anything like Branch Street and Holman Street in Walnut Terrace?

A. Except this stop sign.

Q. I can't draw it.

COURT. Speak up.

A. Stop sign right here. There is a street that comes down—street that comes down in here and this right here, this is Fayetteville Street right here. Fayetteville Street right there and you turn left right here going to Branch Street and I turned left right here——

Q. Which direction would you be going in?

A. I was going in the south direction.

Q. All right.

A. I was going in the south direction down Fayetteville Street.

Q. Up there in the right-hand corner where that "N" is, if you will erase that if you will and put an "S" for south. That is headed south, is that correct?

[ROA 72] A. Yes, sir.

Q. No, excuse us. That should be west, is that correct?

A. Yes.

Q. That way the sun sets?

A. Yes, sir.

I was coming along Fayetteville Street right here and I got to right here. I don't know the name of this street. I think it is Bragg Street. Across from the highway, that pass 401. I came down here to the stop sign and I turned right and I was going down Holman Street then and as I had turned left, I saw John standing——

Q. Put a "J" there. Fine.

A. John standing here and the two children right here and this is the curb and I saw John coming toward the car. Out of the glance of my eye I saw him coming toward the car. So I stopped. I stopped in the middle of the road. John came to the car and snatched the car door open. I told him, "Don't snatch the car door open no more." and so he shut the——

John was my uncle. I had carried him other places before.

Q. Did he hitch rides with your frequently?

A. Every time I'd see him, I always stop. On this occasion I saw him and I stopped. He was already headed over toward the car. I stopped right here. I say in the middle of the road.

Q. Excuse me. Let me interrupt you a minute. There is a rectangle right above that road where it says "Branch". Does that rectangle represent anything that you recognize.

A. The apartment buildings over there. They are approximately the shape of the ones that are there.

And I told John to shut the door and he shut the car door and he told Jesse, said, "I don't want to fight you no more."

"Take him on home, Johnny." I said, "Okay."

[ROA 73] I testified earlier that that was big talk. And so I drive on off. I got right about in here. Jesse told me to let him out and I let him out. I said, "Let me take you home." He said, "No, let me out." I let him out and I drove on out around the curve. This is my aunt's apartment.

Charles McCoy—I live right here. An apartment upstairs. Apartment downstairs. One, two, three, four, five, six. This is the fourth one, fifth one. Charles McCoy stays in about the 7th or 8th apartment I think. I don't know Mrs. Raines good but I know her when I see her. I think she stays in the first apartment right here.

Q. All right. Do those light chalk marks beside of the road, do they represent approximately where the sidewalks are?

A. Yes, sir.

Q. And is there a sidewalk coming off perpendicular down here in front of the apartments that surrounds a big open space?

A. Yes, sir. Right here. That sidewalk goes up to the other apartments. They got a fence in between here. You have got to go all the way around to get to the trash can. This is the trash can right here. This is the building and I saw Jesse last—Jesse turned in between here.

Q. We will come back to that in a moment. Is that Highway 401 on the left?

A. Highway 401.

Q. Does it more or less form a barrier along this side of Walnut Terrace?

A. Barrier? It don't——

Q. The Street don't run directly into it at that point?

A. No. It is just an open space. A whole lot of

grass and that is all. It's kind of a limited access
[ROA 74] highway at that particular location.

I stopped right here in the middle of the block. I let Jesse out and I drove on around the curve. I think I parked somewhere along in here where the "X" is. I got out of the car and I was standing in the yard and they said Huck had shot John. Then I saw Huck going between—there is a fence right here, two trash cans and a fence. Got a foundation, you know, and lay bricks, then got a fence on top of the foundation, the fence I say. The trash can is too far over. The trash can is right here and fence right here and sidewalk right here. That is the sidewalk. Huck was down the sidewalk right here and got a little open path right here. A little open path. Just a small path that go up under the bridge. Leads to the bridge. I saw the defendant go—I saw him going down the sidewalk and that is all. I didn't see him go up under the bridge. I figured that the only place he could go was up under the bridge. I was standing in the yard at the time I saw him. The defendant was walking. He had a white T-shirt on and a pair of short pants.

When I came over to Wainut Terrace, the defendant had not asked me to help him find John Griffin. I wasn't looking for John. I didn't think the defendant was looking for John Griffin. I just gave him a ride to the terrace. Most of the time anybody that I know I usually give them a ride. I go out of the way and take people places.

Mr. BROOKS. All right. No further questions, Your Honor.

Mr. CALDER. I don't have any questions, Your Honor.

(Witness excused.)

Mr. BROOKS. May I approach the bench, Your Honor?

(Counsel approaches bench.)

[ROA 75] COURT. Members of the Jury, the defendant has asked for a brief break. If any of you would like to step into the jury room for about five minutes, you may do so.

(Short recess).

Jesse Thurman Fowler, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS:

Jesse Thurman Fowler is my name. I have lived at 1813 Liberty Place, Southgate Division for three years. I lived at that address on the 1st day of July, 1973. I am twenty-four. I was

born and raised in Raleigh but I left Raleigh in 1964. Every time I would leave I would go off and stay a while and come back. I lived in Washington, D.C., for a while in 1969, '70. I lived in Hillside Terrace Apartments where I worked. I was maintenance supervisor over the apartments.

I have been knowing John Griffin since about '60. I met him in Raleigh. I knew him well when I went to Washington, D.C. in 1969; we socialized together. I have never been fishing with John.

John came up to Washington and stayed with me for about three or four months. I got him a job at the same place I was working in General Maintenance—cleaning apartments and cutting grass. During the two years I have been back in Raleigh I have seen him several times off and on. I was under the impression that he lived in Goldsboro because he had told me that he had remarried and I have been with him to Goldsboro one time.

I hadn't seen John during the week preceding the Sunday, July 1st, 1973. I saw him July the 1st—I saw
[ROA 76] him that morning at the basketball court on Lenoir Street. I didn't usually see him at basketball courts. I used to see him at 522 Person Street a lot. That is where Sylvester Jones resides.

On Saturday, June 30, 1973, I visited the King's Lounge. I stopped through there a couple of times that day. As a matter of fact, I was working that day. I was driving a truck for Rhodes Furniture Company and I had a couple of trips out there that day and whenever I go through there I always stop my truck and go in the King's Lounge for a minute or two. The first time I stopped by there it was early that morning. About 10:00 o'clock because I had a pickup to make, a repossession to make in Kingwood Forest.

At that time I saw Sylvester there. I saw Wilburt [sic] Carter, Scotty, Doc, and Daniel Joyner. Just the general group that usually hangs there the majority of the time. We all talked about going fishing on Sunday. The group did not make any definite plans about going fishing, because everybody was kindly undecided about what they were going to do except Scotty and myself. And Doc said that he wanted to go but he didn't know exactly when he would be available to go. I visited King's Lounge twice more that day. The second time was the time we really seriously discussed the fact about going fish-

ing. The third visit I came through there was about 11:00 o'clock that night. I was just getting off work and parked the truck on the side of King's Lounge and I went in and saw the boys and asked them was they going fishing and Wilburt [sic] said he think he was going. Scotty said he knew he was going. So I told them I had to go home because I was just getting off work to see my wife and I probably would be back up there and see them on Sunday. We were going to meet at the King's Lounge to go fishing.

I got up on Sunday, July 1, 1973 about
[ROA 77] 8:30 or 9:00.

Q. And where did you go when got up?

A. I left and went by Wilbert Carter's house first and he wasn't there, but Scotty was there. He was a roommate of Wilbert's. They had some rum sitting on the table and Scotty asked me to go across the street to the Kwik Pik which is adjacent to the King's Lounge and get a coke and so, as I started out of the door, he threw me his keys and told me to look in the car and get the scotch. I went across the street and got a soda and some cigarettes and I saw Doc over by the store.

I asked Doc was he going fishing and he said that he couldn't go right then because he said his wife had to go out to the hospital or something. He said after his wife got back he would go fishing.

My fishing gear was over at Wilbert's house and so Doc came over there and I told him to take my fishing equipment and put it in his car and keep it. Doc did that. At that time I had a .38 revolver with me. I had it when I left that morning from my house. I knew we were going fishing. I knew we were going to start drinking before we went fishing. So that wouldn't give me any reason to go back home for anything.

We stayed over at Scotty's until 10:00 o'clock, I guess. I asked him to go over to Sylvester's house. We stopped by there and Sylvester wasn't home. Sylvester was gone to play basketball. We left there and stopped over by the basketball court in Kingwood Forest first and then we left. I stayed there for a couple of minutes or so. Ran a game and then we left there and went down on Lenoir Street where Sylvester was. And by the — when I got there, they was about to leave and I asked Sylvester
[ROA 78] was he still going fishing and I can't remember the direct words that he said but he said that he was going to his house and for us to follow.

So Scotty and myself, and I think it was somebody else in the car with us, we left there and went on over to Sylvester's house.

When we got there Sylvester, John Griffin, Puddin, Johnny Earl Brown, James Jones and few more people were already there.

When I got there, they had a good crap game going. Sylvester was playing. He was down on his knees. As a matter of fact, he had the dice. If I am not mistaken, he had the dice then. I kneeled down beside of Sylvester because I had a couple of dollars in my pocket. Sylvester lost the dice and he left his money laying there on the floor and he said he going to the bathroom and I was on the left-hand side of Sylvester. John was on the right-hand side of Sylvester. So when Sylvester got up and went to the bathroom, John took his foot and covered up the ten dollar bill and kind of slid it back toward him. So Sylvester came back in and he asked—the first thing he did was look down on the floor and he said—"All right, where is my ten dollar bill?" And so didn't nobody say anything. So I looked at John. I said, "John, go on and give the man his money." So John reached down and slid the ten dollar bill over to him and said, "Man, I ain't got to try to take nothing from Shorty. Anything I want, Shorty has got, he will give it to me". I said, "I know. You just had your foot on the man's money and heard him ask about it and you didn't say anything."

So he didn't say anything else to me. He didn't say anything in general to me. He was just running his mouth. I didn't pay it any more attention.

So I told Scotty—I said, "Let's break, man." So we went out and got in the car and left there and went out
[ROA 79] to the lounge. It was about—had to be about 2:00 o'clock, I guess. Scotty and I went in the club there and drank a few beers and I was sitting down at the table there and I seen my wife's car drive through the parking lot. It was a glass door. You could look right out the glass door. So I got up from the table and went outside and asked my wife and my sister-in-law if they wanted to drink some beer. So she acted like she had a case about something. So I told her, "Come on inside and drink some beer with me." She said, "Well, let me go home first and take the boys." So they went on down through the parking lot and I didn't go back inside then. I stood outside for a few minutes.

So her and my sister-in-law came back up the street. They came back up and ordered a pitcher of beer and put it on my table and sat there and drank about two or three more pitchers. Then my brother came up and told his wife he was ready to go. So they left. So I was sitting there in the chair nodding. I had crossed my legs and put them in the chair in front of me and I was nodding and my wife told me—she said, "Huck, don't go to sleep because I don't want to have to be bothered about trying to get somebody to help you down the street." So I said, "Okay."

So at that time I got up and walked to the bathroom and which I had been to the bathroom a couple of times before then. I got up and went to the bathroom then and came back and I saw Sylvester standing there. I went over to where he was. I said, "Are you going to let me have that dollar?" And he reached in his pocket and gave me the dollar. So I left from where he was and came down through—tables on this side and tables on this side. Came on down through the tables and John was sitting here——

[ROA 80] The bathroom was in the back. I was leaving the bathroom and coming back toward the front. I was seated near the front door. I passed by the table and John said, "The next time you pull that shit you did this morning—said, I am going to kick your ass." So I said, "Awe Man, you ain't going to do nothing to me." He said "Well, come on the outside then." So I bumped into the table and he got a couple of steps ahead of me. I went outside. I walked out the door. He hit me. Knocked me down. And then it happened so fast. So then he jumped down on me with his knee in my nose. Grabbed me around my throat. So I was just laying there on the ground. So Sylvester grabbed him and pulled him up off me and I got up and I attempted to go around the corner of the building and my wife says, "Huck, come inside and let me clean your nose up—clean your face." I said, "That is all right. I will be all right." So I stayed there for a minute and she said, "Come on. Let me clean your face." I said, "No, that is all right. I will be all right."

So I walked around the side of the building. Then I could just hear everybody around there talking, you know. So I was leaning up against the back of the building. I took my T-shirt what I had on and wiped my nose.

So then Charles Rogers came around the building in his car

and he said, "Huck"—He called me Huck. I looked up at him. I said, "Yes." He said, "You better go straight home. John Griffin is around there asking for a pistol." I did not actually hear John ask for the pistol. The only reason I knew was because Charles Rogers told me. So then I—I said to myself, well, I went over that way this morning. Seemed like he wanted to start something. I am going across the other side of town to my sister-in-law's house. This is my wife's sister that I am talking about now. She lives in Walnut Terrace. Her name is Queen Ester Williams.

[ROA 81] She lives on a dirt street in Walnut Terrace. She lives down in the back of Walnut Terrace. So I walked on up through there, on through the projects and by the time I go to the corner I caught a ride. Seen somebody stop on the corner, so I asked them to give me a ride. I don't know who it was. That is the corner I go to to hitchhike. Everybody does. I got in the car and they asked me what was wrong. I told him I just got in a fight and broke my nose. I was quite sure it was broke. And I didn't say anything else to him. So he took me on down as far as Lenoir Street and East. He was turning right heading north and I told him let me out right here and I walked across the street and I heard a horn blow, I think. Anyway I turned around and looked and I saw Johnny coming up Lenoir Street. So I threw my hand up at him and he pulled over to the side. So I shot across the street and I asked where was he going. He said he was going to Walnut Terrace. So I asked him, "Can I catch a ride?" He said, "Yes." Then he asked—he seen my shirt was bloody. He says, "What happened to you?" And I said, "Me and John Griffin got in a fight." And so then he started talking about—didn't say no more about that. He started talking about he was tired, his leg had been troubling him and had to go to the doctor the next week and then we went on over to Walnut Terrace. He was talking all the way. I asked him for a cigarette. He gave me a cigarette. Got to Walnut Terrace and went on down Holman Street and as we turned on Holman Street——

Q. Excuse me for a moment. At this point I will get you to come over to the blackboard—the green board and indicate how you proceeded.

A. We came on down Fayetteville Street to right here, Fayetteville, where Peacock Grocery made a left turn and went up

to the corner right here, which is the corner of
[ROA 82] Walnut and Holman and he made a right turn to right here, got here, we turned left and that was when John was standing on the corner over here. John Griffin was right along here about the point at Mrs. Raines' house. Probably right along in here.

Q. And how wide a lot is that between the end of the apartment and Holman Street?

A. It is large enough to play football in. We used to play football down there. He wasn't in the lot. He was on the sidewalk in front of the lot and like in front of Mrs. Raines' apartment.

So as we were turning the corner here, John evidently saw the car. He started waving the car down. So Johnny pulled up to right along here and stopped. When Johnny stopped the car, he ran over and pulled the car door and snatched it open. Other cars were parked along the south side of Branch Street at that point. There were about three or four cars on the other side of the street.

And so as the car stopped, John ran out to the car and snatched the car door open and he started running off at the mouth about "I don't want to fight you no more. So why don't you go on home." At that particular time, you know, sounded like he was saying, "Come on, man, I don't want no more trouble right now." You know. So then Johnny told him to close the door and he went on up the street until right along in here. Right along here. So I told Johnny to stop the car and let me out and he says "I will take you home." I knew he had been saying that he was having trouble with his leg and was tired and sleepy and was going back home and go to bed. I told him to stop right along in here, and he stopped it and I got out where I told him to stop, right here.

Q. Why did he stop there?

A. Because I could easily—there is a group
[ROA 83] of apartments sitting right here and right here and there used to be a pavement leading directly across through that field there, come right through there and go on up by the bridge. I used to live over in Walnut Terrace for six or seven years.

I got out of the car and stepped up on the curb, and Johnny Dolby pulled off and I looked back down the street and I saw John Griffin.

When I got out of the car, I was going across the street and going under that path and under the bridge on 401. I got out of the car and turned to go around the back of the car. That is when I saw Charles McCoy.

Q. If you will draw a little circle where you saw Charles McCoy. Draw it as dark as you can because it is going to be hard to see.

Q. Between that "C" and "H" in Branch?

A. Yes.

Q. And was he close to either of the cars that were parked in the street?

A. Yes, he was walking in the street like he was getting ready to cut—he was going like that. After I saw him—he went straight on up through here.

Q. All right. Just draw a line where you saw him go. All right, and when you turned, what did you see?

A. I saw John Griffin tipping behind him. John was crouched down tipping up the street behind him.

Q. Take several steps by how you mean tipping.

(Defendant demonstrates.)

I saw John behind Charles McCoy right here by the car.

Q. Put an "X" wherever you think you saw him. The "X" where you first saw John when you looked
[ROA 84] around?

A. John was headed directly down the street toward where I was standing. So I put my hand in my pocket and he pushed Charles McCoy in the back and I pulled my gun out of my pocket and I shot it one time. I kind of shot it up like in the air. I was not trying to hit anybody. I was hoping that, you know, he was turning backward.

Before I fired I saw John crouched behind McCoy for a couple of seconds or so. Charles was still between me and John. Then that is when John pushed McCoy and said, "Nigger, I am going to make you use what you have got in your pocket."

That is when I pulled my gun out and shot hoping he would turn around and go back. So he didn't turn. Looked like he was running faster toward me and that is when I put the gun down like this and shot him. When I shot the second time, I was as far from him as from here to that Officer. After I shot the gun, I presumed it hit him. I didn't know because he turned

around and looked like he started running back down the street. I put my gun down by my side and walked across the street here.

Q. Draw a zig-zag line where you walked.

A. I walked in the field right here. And when I got up on the curb over here I looked back and I didn't see John no more. So I saw that fence up there. I said, "I can't go through that way no more.["] So I came on out here and went on up through there.

Q. Draw a zig-zag line as far as you walked on that particular map on the blackboard. Show where you came on down here.

A. Came on down the sidewalk here. Down through there. That is a bridge right there under that goes up under 401 and goes on out through.

[ROA 85] When we first stopped at the corner of Holman and Branch Street, I was not out looking for John Griffin. I was not expecting to find him in Walnut Terrace, because I had just left him out at King's Lounge where I had been. Seem like it had been ten or fifteen minutes I had left him out at the King's Lounge. I was not eager to get into another fight with him. As far as I was concerned it was all over. From the way he said it at the car it was like it was all over with him.

At the time I stopped at Holman and Branch Street, I was not fearful of him. I was not of the view that I ought to avoid him.

When I got out of the car and started home, I was not expecting to see John Griffin anymore. When I saw him crouched down behind McCoy, I didn't know what to think at first because he was tipping behind him coming toward me, you know. And I didn't know what the purpose was in him tipping behind Charles. So the, he saw that I saw him, he pushed Charles and said—that is when he said he was going to make me use what I had in my pocket. I thought he was going to do something to me. I heard that he was trying to get a gun. All that came to my mind at that particular time, you know. I didn't know what to do. I just tried to keep him off me.

After I left Walnut Terrace, I went on through the railroad track and down the little dirt part of Wilmington Street and over to Mark Street, up Blount Street and made a phone call—called my wife. I told her I was cross town on Blount Street. I told her, I said, "I am not for sure but I think I shot John Griffin," and asked her to come and pick me up and she came

and picked me up. She took me back out to Southgate and my nerves were kind of shook up. I said, "Stop right here for a minute at King's Lounge." She said, "I'm

[ROA 86] going home." I said, "Well, drop me off." I went in and I went to the window—in the lounge I went to the window and got a mug of beer and came out and I left there. I went across the street to Wilbert Carter's house and told him I thought—so I told him—he was sleep, laying on the couch asleep. I told—I said, "Man, I think I shot John, John Griffin." And he said, "No, you ain't. You ain't did nothing like that." I said, "I don't know, I think I did." I told him to call to the hospital and see if somebody, if he was out there. So he said, "Naw, I am going and ask your wife something." Anyway I know I left out of the back door and Wilbert went over to the King's Lounge.

Q. He left you there alone while he went over to the King's Lounge?

A. Scotty was there. And I was sitting back there talking to Scotty and he went over to the King's Lounge and asked somebody and came back and said that the guy had been shot. At that time I didn't know if John was living or not. So I left out [sic] and I said if he is shot, I am going and turn myself in and I went down the street and stopped at Sam Perry's house, which is a bondsman. I told him that I think I shot John Griffin and I said I am going and turn myself in. Will you come and get me out on bond and he told me, he said, "John is dead." So I told him, I said, "Well, I am going downtown and turn myself in. Will you still get me out on bond?" He said, "I don't think they are going to give you a bond." I said, "They won't give me no bond tonight?" He said, "Naw." I said, "I am still going downtown and turn myself in." He said, if I get a bond to call me and he would come and get me out.

My house is right down the hill about a block from Wilbert's house. I walked from his house to my house. So I went home and I asked my wife to prepare me some-

[ROA 87] thing to eat. While she was fixing my plate I told her I was going to take a shower and I changed clothing and then I ate a little I told her I was ready. Told her I wanted to go see my mother first before I went downtown. So she took me to my brother's house to see my mother. I told my mother what happened. She asked me how did it happen. I told her that I saw John in Walnut Terrace and looked

like he was trying to jump on me again and that I shot up in the air and he kept on coming and I shot again and I think he was dead from what I heard. So I was going downtown and turn myself in. So she came with me and my brother, Lynwood Clack, came.

I do not remember what time I got downtown. It was pretty late because I sat out there at my brother's—I talked to my mother for a long time before I came because I knew if John was dead that I was going to be in jail for a while. So I wanted to talk to her before I came down here.

When I got downtown, Sylvester asked was Detective Williams working tonight, and somebody said, Naw he wasn't working tonight and I told them that I think the police was looking for me. They asked me what my name was. I told them. I told them they were looking for me I thought for shooting John Griffin. So they took me upstairs and by the time I got upstairs then Detective Williams came. He questioned me.

Q. Do you recall telling him what he read in the statement that he read back today?

A. Not word for word. I think it was pretty much the same thing.

I indicated that I used to live over in Walnut Terrace for about seven or eight years. It is within the confines of the border of the map that is on the board. It is on,
[ROA 88] right there at the corner of Holman Street. See the corner of Holman Street there at the bottom. Well right there at the end of the bottom line there is a street right there. I lived on the street right there. Right up the street about three doors. As you turn off the corner of Holman Street, I lived about three doors.

There is a basketball court right down to the left-hand side of where I used to live. With respect to this diagram the basketball court would be underneath everything on the right-hand side of Holman Street. It would be in the northwestern direction from the map that is shown on the board.

At the time I shot at John Griffin, at that particular time I really don't know if I had hit him because the only thing I saw looked like he turned and was running back down the street. Then I just turned around and walked on away. I couldn't really tell whether he was hurt or not. I didn't see

Charles McCoy anymore. The last time I saw him he was over on the sidewalk on the south side of Branch Street.

At the time of the fight over at the King's Lounge, I had no urge to use the gun on John Griffin. I don't think I would shoot anybody intentionally, not to kill them. I didn't think about shooting him because after I went around the side of the building, he didn't come around there. I figured it was all over, which then the fellow told me John was looking for a pistol, so I scatted on up [sic].

Mr. BROOKS. No further questions at this time, Your Honor.

Cross examination by Mr. CALDER:

I got the gun because we was going fishing and usually when we go fishing, I carry my pistol to kill snakes. I had it in my pocket the whole time I was playing basketball.
[ROA 89] I had it when they were playing dice over at Sylvester's house. I didn't go there intentionally to play dice. I had the gun with me at the King's Lounge at the different times I was there. Every time I was around John Griffin that day I had the gun. The handle won't [sic] sticking up. I had deep pockets. I dropped the gun in there and you really couldn't tell. If I sat down and crossed my legs and the handle sticks out, you could tell.

After I got beat up at the King's Lounge, I went straight to Walnut Terrace. I was going there to see Queen Ester Williams.

Q. And, in other words, you left the King's Lounge with the idea of going to see Mrs. Williams?

A. After I had gotten downtown, yes.

The fight at King's Lounge occurred about 6:30. I don't know if the shooting occurred at twenty minutes after eight.

Q. Why did it take you two hours to get from Rock Quarry Road to Walnut Terrace?

A. Evidentially [sic] the time must not be precise because I left the King's Lounge and other than stopping on the corner of Proctor and Rock Quarry Road catching a ride, from there to the corner of East and Lenoir, I went directly to Walnut Terrace. It took me approximately half an hour to get from King's Lounge to Walnut Terrace. When I left King's Lounge, John Griffin was still there.

So when Mrs. Raines said that John Griffin was in front of her house for at least half hour—I would have to contradict her. I got out of the car at the middle of the block there so that I could have the easiest walk back out of the terrace, out to

401. I wanted to leave the terrace even though
[ROA 90] I had spent all of this time in getting over there because Johnny popped up there. I said I am going on and leave down there. He is popping up like the devil everywhere I go. I am going back to my part of town. Maybe he won't get back over there by the time I get there. So I decided to go on back home. I didn't know that whenever John was in town on the weekends, he went over to see his children. Whenever I see John in town, John is over at Sylvester's house.

When I got out of the car, I couldn't walk directly across the street. I would have had to walk through the car. When Dolby pulled off, I started across the street and that is when I looked back down the street and I saw John Griffin behind Charles McCoy. I walked off the sidewalk back to the curb and John was gaining on me then. I can't definitely say that I did walk back down the street toward him, no. I don't remember walking past Jonice Griffin toward John Griffin. I don't recall stopping and talking to Paula Griffin. If I had stopped to talk to anybody in that length of time, John Griffin would have been right on my nose in that distance.

I had never had a fight with John Griffin before in my life. I have had a few fights before. I have been convicted of assault a couple of times. No, I wouldn't say it has been six times. No.

Q. All right, were you convicted for an assault on the 18th of November, 1966, assault with a deadly weapon?

Mr. BROOKS. Objection.

COURT. Overruled.

A. I am not going to say, yes, because I don't remember any dates directly and I am not going to say I was arrested in 1966 because I don't remember back that far. I was a minor during that time, I think.

[ROA 91] I don't remember being convicted no three times. I don't remember being arrested three times in no three months for assault. In 1968 I remember being convicted for fighting—simple assault. And then in 1972 I was—convicted of assault on a police officer. While in Washington, D.C., I was not convicted of anything.

We were still friends as far as I was concerned up to that day. At that particular time I was afraid for what he might have or might be intending to do after the statement that I heard that he had made. He asked my brother-in-law for a pistol. Well, my

sister's boyfriend for a pistol and said that he was going to kill me. The King's Lounge is walking distance from my house.

After John Griffin beat me up, I thought that I had a broken nose. I knew my nose was bleeding.

Q. All right, if you were so concerned about your nose, why didn't you go home and have it looked after or go to the hospital?

A. Wasn't important. I didn't think that much about it. It was just bleeding and I wiped the blood off it and wasn't really troubling me.

John Griffin said to me that he was going to make me use what I had in my pocket. He said that when I was on the street.

Q. Now how did he know that you had something in your pocket that you could use?

A. Evidently—he was right over me when I was in the car. Like he was going to snatch me out of the car right then and the gun was in my right-hand pocket and he was standing right there. I don't know if he could see the print of it then. I guess he did. He didn't crack the door. He snatched it all the way open.

I wouldn't know if he knew that I had
[ROA 92] a gun at the King's Lounge.

I testified that I was not sure that I told several people that I only thought that I had shot John Griffin. When I shot I did not have my arm straight out in front of me and I stated that I dropped the gun down and shot the second time.

After I shot and after he had turned his back and started in a different direction, I couldn't see him at that point. After I seen him turn around and he went down the hill, I couldn't see him anymore. Nobody was doing a whole lot of hollering and screaming. I didn't hear Mary Raines. She didn't hear herself I don't think. To my knowledge, no one was doing any hollering or screaming. I didn't see anyone running.

The only thing I saw was Charles McCoy and he continued to walk away. He continued to walk away just as if nothing had happened—just a gun fired in the air. I didn't even see the children anymore. I saw John pushed McCoy. It was almost as if you were tipping behind somebody and you step on their heel. How it will cause you to stumble—to push.

Q. Well, he was trying to hide out behind McCoy, wasn't he?

A. If that is the way you want to put it. He didn't see me

coming down the street. I was standing on the curb waiting for the car to pull off by the curb, waiting for the car to pull off so then I could—I walked on down the street around the back of the car. I had moved at least some distance from the place where I got out of the car to the place where I ultimately pulled the trigger. I had taken steps. I wasn't on the side of the street. I was in the street.

Q. You had moved west according to the map, you had moved back down toward Mrs. Raines' house?

[ROA 93] A. Right, in the street.

Q. And so you were walking toward John?

A. In the street, yes.

Q. You weren't walking away from him, were you?

A. I couldn't walk through the car and I wasn't going to walk around in front of the car. I can't rightly say how long that car sat there.

I didn't tell John Dolby anything about he wouldn't get in trouble. I said, go ahead up the street.

Q. Didn't you say what the officer said was your statement to the officer was about correct?

A. I said I couldn't say it was word for word or not.

I didn't tell the officer that I told Dolby to go ahead so he would not get in any trouble. I told him to stop the car and let me out and he said, "I will take you home," as he stated and I said, "That is all right." And he stopped the car. I got out of the car and shut the door and that is all that I said to him and that was all that he said to me. I did not know there was going to be trouble at that time. Like I said before, it was all over with.

When I got out of the car, like I said before, I stopped for Johnny to pull off with the car, pull the car off and I saw John coming toward me and I started down the street to go on across the street because it was a parked car on the other side of the street.

As I was walking down the street away from where I shot I did not see Christine Hall. No, I didn't look right at her and shake my head. The only person I saw was Charles McCoy and he continued to walk on the opposite side of the street in the same direction as I was going but only I cut off

[ROA 94] and went to the left and where he went, I don't know.

Q. Didn't you say that you came from the scene of the shooting across the street down this way and around the building?

A. Yes, right.

Q. All right, how were you able to see Charles McCoy walk on off but you couldn't see what was going on? Did you look halfway around and not all the way around, is that it?

A. If you standing beside of me, I can see. If you standing directly across the street and make a half turn with my head. [sic]

Q. All right, what did you mean or what were you doing when you threw up your arms after Johnny Dolby called out to you from his house?

A. He called me. He said, "Huck." I just said (demonstrating) I am gone. Just going on home. I was just leaving that part of town going back to where I thought maybe I wouldn't be involved with John anymore.

Why did it take me so long? I explained it. It won't hard for me to make my mind up about going do[illegible]own.

Q. You could have walked straight down [illegible]he Courthouse.

A. At the time I wasn't conscious of the fact that I had shot John because I didn't know. I made efforts to find out when I got home, when I got to Southgate.

I don't know how old John Griffin was. He wasn't my age. Griffin has children. I am not going to say they are almost as old as I am. I am twenty-four. Twenty-five next month. I wouldn't know how old his oldest is.

Q. Why did you feel it was necessary to use

[ROA 95] that gun instead of using your fists or running away; why did you have to use that gun?

A. Like I said, the first thing came to my mind John had been asking for a pistol and said that he was going to kill me. I just took my gun out and shot. If he had one to shoot me, he kept coming. So I shot the second time down and he turned around and I said, well must not have nothing and I turned around and walked off.

I didn't see a gun. When I saw John coming toward me behind Charles, I did not want to fight anymore. My intention was to get on away from there.

Q. Weren't you pretty hot about the fact that John Griffin had mashed up your nose, kneed you in the face, kicked you when he had you down on the ground in front of your friends down in front of King's Lounge, sort of humiliated you?

A. Nothing but a little fight. A fight that I lost. It won't [sic] the first one that I had lost. No, I did not pull the trigger a couple of times after the second shot.

After I crossed the street, got over on the sidewalk I just dropped the gun. That was the only gun I possessed.

Q. And yet you just toss it away, why is that?

A. It was worth a couple of dollars to someone that was down and out or who needed some money. I haven't never owned but one gun. I had shot that gun maybe one time before that day. I did not throw it away after that time. I just threw it down.

I told my wife that I thought I had shot John Griffin. King's Lounge is where I first stopped after she picked me up. My nerves was shook and I wanted a beer. I wasn't time conscious, so I didn't bother to look at any clock.

[ROA 96] Mr. CALDER. This is all the questions I have

Redirect by Mr. BROOKS:

When I had dinner that night, it was late in the night. I don't know what time it was. When I was over at Walnut Terrace it was already dusk. Almost dark. But it was light enough so you could still see a whole block without any difficulty. I think you probably could see two blocks. I can't remember definitely. By the time I had gotten to the King's Lounge, it had gotten dark. That was long enough for me to walk to Blount Street, pick up the phone, call my wife for her to come and pick me up. It won't quite dark when she picked me up.

Q. The solicitor asked you about any previous arrests and convictions for assault. He asked you about one incident in 1972. Do you recall the situation out of which that arrest occurred?

A. Yes.

Q. What had occurred on that occasion?

A. Police officer stopped me and was going to arrest me for public intoxication and I resisted and so he threw me in the car and signed a warrant for DUI, resisting arrest and assault on an officer and when I got to court, the resisting arrest and the DUI was thrown out. On the assault on the officer charge they gave me a hundred dollar fine and costs of the court.

When I went to see my mother I guess it was about 11:00 o'clock. I stayed out there for about a half hour, I guess, or so. I don't know. Anyway I stayed out there and talked to her for a while because I knew I was going to jail and I didn't want her

to have to come and see me in jail. I did not

[ROA 97] consider that fight during the afternoon to be something over which me and John would lose friendship. I did not know where John Griffin was in fact living at the time while he was in Raleigh. Before I went to see my mother, I was at my house long enough to take a bath, change clothes and eat. And then I went on over to see my mother.

After I visited with my mother, I went downtown and she joined me in going downtown to the police station.

Mr. BROOKS. No further questions, Your Honor.

Mr. CALDER. No recross, Your Honor.

COURT. All right.

(Witness excused.)

Mr. BROOKS. At this time, Your Honor, the defendant would like to call Rev. Robert Talley.

Rev. Robert Talley, being first duly sworn, testified as follows:

Direct examination by Mr. BROOKS:

Robert A. Talley is my name. I live at 617 Grantland Drive. I am Route Supervisor, A Dormitory of State University. I am a minister of the United Church of Christ with the North Carolina Association.

Q. Is that an ordained minister?

A. Not of a church. Evangelist. I work with all denominations. I have been knowing the defendant ever since he was a little boy. I would say at the age of—I call him a little boy because I always took him as one of mine. He was about the age of 14 or 15 years old. I first knew the defendant in Walnut Terrace—before we moved to Walnut Terrace but that is where he was living. I was living in Garner. All his family at-

tended my church on Rand Street, United

[ROA 98] Church of Christ in Garner. The defendant is not a member of that church but he attended that church with them as long as he was around them. I lived 1045 Walnut Street and he lived in the eleven hundred block of Walnut Street at that time. He come to my house very much. Just like my own children. Sat at my table and eat with us. Sleep with the children and stayed as long as he wanted. He always had great respect for our family any place I seen him out in the public. He was not prone to get into a lot of fights

not that I knew of. He did not cause a lot of trouble that I knew of.

He wasn't around his family much because—on account of his job situation. He wasn't around as often as they was. He attended church like his sisters and brothers. He made friends very readily. He assisted very much in church or neighborhood projects. He was real cooperative in that way. He was a friend. Any time he could lend a hand in the neighborhood in helping someone, he would do that and anything he could help out in and in assisting good relationship. He would, also, do that as far as I know. He was not much of a problem to his parents.

I continued to see him in Raleigh until he went away. He did go north for a while but he came back. When he returned, I saw him. He would always make way to my house whenever he got back in the State to let us know he was back and see us. Stay, take dinner with us. Stay as long as he wanted to.

I moved out of Walnut Terrace in 1968, I believe or '67. I wouldn't say that he moved out the same time we did but he did quickly after that but not the same time. I moved to Southgate, 1837 Rock Quarry Road. He moved 1813 Liberty Place on the street back of us. So we were still neighbors. I continued to see him.

[ROA 99]

As far as I know, he always had a right nice general reputation.

Mr. Brooks. I have no further questions, Your Honor.

Mr. Calder. Your Honor, I have no questions of this witness.

Court. All right, sir.

(Witness excused.)

Robert C. Monroe, being first duly sworn, testified as follows:

Direct examination by Mr. Brooks:

Robert C. Monroe is my name. I live at 1201 Glascock Street. That is—well Raleigh North Apartments. I am really not too familiar—I have been just here for a year and a half. And so it is on the far side over behind Mary Elizabeth Hospital. I am the Residence Manager of Southgate Apartments, Raleigh North Apartments and Mill Bank Apartments.

I know the defendant. He worked for me. He was working for Southgate Apartments as a maintenance man when I took this job and he was working at that time and he worked for me approximately six months and then we had a lay off of some of the men and so I had had that had worked than him and so I had to let him go. I went to work July the 15th of '72. So he

worked probably six months after that. He was a real good maintenance man and he did good work as far as I was concerned and I hated to lose him at that time. I never had any problems with him.

Q. Do you know anything about his general reputation?

A. No, sir. Just when he was working for me. Now I do know he must be a good provider for his family because he has always paid his rent real good. He was a tenant. His wife is still a tenant of mine now. He was a tenant at the time I came to manage the apartments.

[ROA 100]

Mr. Brooks. No further questions of this witness, Your Honor.

Mr. Calder. I have no questions.

Mr. Brooks. Your Honor, at this time, the defense rests.

Court. Any further evidence for the State, Mr. Calder?

Mr. Calder. No rebuttal evidence for the State, Your Honor.

Mr. Brooks. I would like to enter a motion as of nonsuit at this time.

Court. All right, motion denied and exception.

Mr. Brooks. Exception.

(Argument of defense and State followed.)

[ROA 100] Charge to the Jury

Members of the Jury, the defendant, Jesse Thurman Fowler, is charged in a bill of indictment with the capital felony of murder in the first degree. It being charged that on the first of July of this year he did unlawfully, willfully and feloniously of his malice aforethought did kill and murder one John Griffin.

To that charge the defendant has entered a plea of not guilty and upon that plea he is entitled to a trial by jury and it becomes your duty to find the facts from the evidence and apply to the facts as you find them to be the law as given to you in these instructions and thereby reach your verdict of guilt or innocence.

[ROA 101]

It is my duty to instruct you in the law arising upon the evidence and it is your duty to follow the instructions of the Court as to what the law is as it applies to this case, not what you may think the law is or ought to be or necessarily what the lawyers argue to you is their views of the law but you are to take the law as given to you in these

instructions and apply it to the facts as you find them to be and thereby reach your verdict.

As to what the facts are, it is for you and you alone to say from the evidence presented what you do find to be the facts. It is your duty to consider all of the evidence and to rely on your own recollection as to what the evidence was as it came from the witnesses and not the recollection either of the lawyers or of the Court as to what the evidence was. It is your duty to weigh and to consider the testimony of each witness, whether for the State or for the defendant, and determine the weight that you will give to that testimony and you may believe all, part or none of what a witness testifies to as you find that witness worthy or not worthy of belief and the weight to be given each witness' statements is for your determination.

In passing on the weight to be give a witness' testimony, you will take into consideration every circumstance which appears in the trial which would naturally bear on that person's truthfulness and the weight to be given his or her statement.

You will consider the manner and demeanor of a witness on the stand; the reasonableness or unreasonableness of the witness' testimony; the opportunity of the witness for seeing, hearing, knowing and remembering that concerning which he or she testified; the interest or lack of interest of a witness in the outcome of the case; any bias or prejudice
[ROA 102] which may appear; the character and reputation of a witness where that appears and every other circumstance which would naturally bear on a person's truthfulness and the weight to be given his or her statement and you will give to the testimony of each witness the weight that you find it is fairly entitled to.

The defendant by his plea of not guilty raises in his behalf a presumption of innocence. He is presumed to be innocent of the charge against him and the State must prove his guilt beyond a reasonable doubt.

I instruct you that the words "reasonable doubt" mean just what they say. A doubt based on reason and common sense arising out of the evidence in the case or the lack of evidence and not a vain, imaginary or fanciful doubt.

If after weighing and considering all of the evidence you are fully satisfied and entirely convinced or satisfied to a moral certainty of the truth of facts which constitute guilt of an offense, then you would be satisfied beyond a reasonable doubt

and it would be your duty to return a verdict of guilty of that offense. On the other hand, if after weighing and considering all of the evidence there is a doubt in your mind based on reason and common sense from the evidence or from the lack or insufficiency of the evidence of the truth of any fact which is necessary to constitute guilt, then you would have a reasonable doubt and it would be your duty to give the defendant the benefit of the doubt and find not guilty of that offense.

I instruct you that under the evidence in this case you may return one of four verdicts. You may return a verdict of guilty of murder in the first degree, or you may return a verdict of guilty of
[ROA 103] murder in the second degree, or you may return a verdict of guilty of voluntary manslaughter, or you may return a verdict of not guilty.

It is necessary that I define for you the essential elements or facts necessary to constitute each of those offenses. In North Carolina there are degrees of unlawful homocide [sic] recognized by our law. Namely, murder in the first degree; murder in the second degree and manslaughter. Manslaughter may be divided between voluntary and involuntary manslaughter and in this case you will not be concerned with the charge of involuntary manslaughter.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.

Manslaughter is the intentional or unlawful killing of a human being without malice and without premeditation and deliberation.

The presence in the one case of premeditation and deliberation and the absence in the other of either one or both of those elements is the distinction between murder in the first degree and murder in the second degree. The presence in the one case and the absence in the other of the element of malice is the distinction between murder in the second degree and manslaughter.

So an unlawful killing is manslaughter. An unlawful killing with malice is murder in the second degree. An unlawful killing with malice and with premeditation and deliberation is

murder in the first degree.

[ROA 104] For the State to be entitled to a conviction of the capital offense of murder in the first degree, it must prove beyond a reasonable doubt five things. First, that the defendant intentionally and with malice shot John Griffin with a deadly weapon; second, it must prove that the shooting was a proximate cause of the death of John Griffin. A proximate cause is a real, direct cause, a cause without which that death would not have occurred. Third, it must prove that the defendant intended to kill John Griffin; fourth, it must prove that he acted after premeditation; and fifth, it must prove that he acted with deliberation. If the State proves those five things beyond a reasonable doubt, the defendant would be guilty of murder in the first degree.

I have used the word 'premeditation' and 'deliberation'. Those elements must be proved beyond a reasonable doubt before a verdict of murder in the first degree can be rendered against the defendant. The State may prove these elements in many ways. Ordinarily they are not susceptible of direct proof but may be inferred from circumstances such as ill will, previous difficulty between the parties, declarations of an intent to kill either before or after the inflicting of the fatal wound, or where the evidence shows that the killing is done in a brutal and ferocious manner.

Premeditation and deliberation may be shown by circumstances and in determining whether there was such premeditation and deliberation the jury may consider evidence of the absence of provocation and all other circumstances under which the homicide was committed.

[ROA 105] In determining the question of premeditation and deliberation the jury must take into consideration the conduct of the defendant before and after and all attending circumstances in determining whether the act shall be attributed to premeditated design or sudden impulse. Deliberation means that the act is done in a cool state of the blood. It does not mean brooding over or reflecting upon it for any definite length of time but it means an intent to kill carried out by the accused in a cool state of blood in the furtherance of some fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose not under the influence of violent passion suddenly aroused by some lawful or just cause or legal provocation.

Premeditation means to think beforehand and when we say that a killing must be accompanied by deliberation and pre-

meditation it is meant that there must be a fixed purpose to kill which precedes the act of killing by some length of time, however short. If the purpose to kill is formed simultaneously with the killing, then there is no premeditation and deliberation and in that event, the homocide would not be murder in the first degree.

So those are the elements of the felony of murder in the first degree.

As I have already indicated, murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. So, it will be observed that malice is an essential ingredient of the crime of murder in the second degree. Malice includes hate, ill will or spite. It also means that condition of the mind to prompt a person intentionally to take the life of another without just cause, excuse or justification. Malice may be shown by evidence of hatred, ill will or dislike. And malice is implied in law from an intentional killing with a deadly weapon. A .38

[ROA 106] caliber pistol is a deadly weapon within the meaning of the law. Malice may be general or particular and it may be express or implied. General malice is wickedness, a disposition to do wrong regardless of social duty and fatally bent on mischief.

Particular malice is ill will or grudge to do revenge on a particular person. Express malice would exist where there is an intent to kill or cause some great bodily harm in the mind of a person evidenced by either threats beforehand or declarations afterward or by other circumstances showing directly that such intent really existed in the mind of the person charged with the crime at the commission of the crime.

When there is no direct evidence of such intent but the fact of the killing is surrounded by such circumstances as to carry a plain indication of some wicked intent of an aggravate l nature, then the law in such case implies malice.

And malice is implied where one intentionally inflicts a wound which proximately causes the death of another.

There is a distinction, Members of the Jury, between the intent to kill, which is an element of murder in the first degree, and the intentional infliction of a wound which proximately causes death. For murder in the second degree to exist it is not required that there be a fixed intent to kill but if one intentionally does an act such as shooting another one, under such circumstances that death might reasonably be expected from

that shooting and death does proximately re-
[ROA 107] sult or directly result from that shooting, that is an intentional killing within the meaning of murder in the second degree. And when it is admitted or established by the evidence that the defendant intentionally killed the deceased with a deadly weapon, the law raises two presumptions against the defendant. First, that the killing was unlawful; second, that it was done with malice. And an unlawful killing with malice is murder in the second degree.

Where those facts are proven, that is an intentional killing with a deadly weapon, the burden then rests upon the defendant to establish facts which would mitigate the offense to manslaughter or justify it all together. This burden on the defendant is not to prove those facts beyond a reasonable doubt but simply to the satisfaction of the jury unless they arise out of evidence from the State. So if an intentional killing with a deadly weapon is proved, nothing else appearing, that would be second degree murder. The law implying malice under those circumstances.

The defendant may rebut the presumption of malice by showing to your satisfaction the facts which raise adequate provocation or may justify the killing all together by showing of facts which satisfy you that he acted in self-defense.

So those are the essential elements or facts necessary to prove the charge of murder in the second degree.

As I have said, manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

Voluntary manslaughter is an intentional killing in sudden passion or heat of blood caused by something which the law
recognizes as adequate provocation. The most
[ROA 108] common instance of voluntary manslaughter is where one unlawfully kills another by reason of anger suddenly aroused by provocation which the law recognizes as adequate. Where anger is naturally aroused by that provocation and the killing is done before time has elapsed for passion to subside and for reason to resume control, in such case the anger so aroused would displace malice and reduce the unlawful killing to the grade of manslaughter.

So if an act of killing, though intentional, be committed under the influence of passion or in the heat of blood produced by an adequate or reasonable provocation and before reasonable time has elapsed for the blood to cool and reason to resume control and is the result of temporary excitement by which the

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control of one's reason is disturbed, not from any wickedness of heart or cruelty or recklessness of disposition or desire for revenge, then the law recognizes the offense as a less serious nature then murder and gives it the designation of manslaughter.

The rule is that to reduce an intentional killing from murder in the second degree to manslaughter by reason of adequate provocation is [sic] that a person's reason should be at the time of the act so disturbed or obscured by passion to the extent which might render an ordinary person of fair, average disposition to act rationally and without due deliberation or reflection and from passion rather than judgment [sic].

The legal provocation which will reduce murder in the second degree to manslaughter must be more than mere words. As
language, however abusive, neither excuses or
[ROA 109] mitigates a killing. The law does not recognize circumstances as legal provocation which in themselves do not amount to an assault or a threatened assault.

If the State has satisfied you beyond a reasonable doubt that the defendant intentionally shot John Griffin and that that shooting proximately caused his death, then to negative malice and reduce the crime to manslaughter the defendant must satisfy you of three things: First, that he acted in the heat of passion. This does not mean mere anger. It means that his state of mind was at the time so violent as to overcome his reason, so much that he could not think to the extent necessary to form a deliberate purpose and control his actions.

Second, he must satisfy you that this passion was produced by acts of John Griffin which the law regards as adequate provocation.

And this would consist of anything which had a natural tendency to produce such passion in a person of average mind and disposition.

Under provocation, assault by John Griffin on the defendant would be such provocation or a threatened assault by John Griffin on the defendant would be considered such provocation. Thirdly, the defendant must satisfy you that the acts of provocation took place—Correct that.

Thirdly, the defendant must satisfy you that the killing took place so soon after the provocation that passion of an average
mind—that the passion of a person of average
[ROA 110] mind and disposition would not have cooled.
If although you are satisfied beyond a rea-

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sonable doubt of an intentional killing by the defendant of John Griffin with a deadly weapon, if you are satisfied not beyond a reasonable doubt but merely satisfied of those three things, then the defendant would be guilty of voluntary manslaughter.

To justify a killing by reason of self-defense the defendant must satisfy you of four things; that is, if you have found beyond a reasonable doubt that he intentionally shot John Griffin and that proximately caused John Griffin's death, then the defendant must satisfy you of four things to justify such killing on the grounds of self-defense.

First, that it appeared to him and he believed it to be necessary to shoot John Griffin in order to save himself from death or great bodily harm.

Second, that the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.

It is for the jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including the size, age and strength of the defendant as compared to John Griffin, the fierce-

[ROA 111] ness of the assault, if any, being made upon the defendant, whether or not John Griffin had a weapon in his possession, and the reputation, if any, of John Griffin for danger and violence.

Thirdly, the defendant must satisfy you that he was not the aggressor. If he voluntarily and without provocation entered the fight, then he was the aggressor. And one enters—Strike that.

Fourthly, the defendant must satisfy you—if you find an intentional killing with a deadly weapon, he must satisfy you that he did not use excessive force, that is, more force than reasonably appeared to be necessary to him at the time. Again, it is for you, the jury to determine the reasonableness of the force used by the defendant under all the circumstances as they appeared to him at the time. If you find those four facts to exist, if you are so satisfied, then he would not be guilty, of any offense. If, although he otherwise acted in self-defense, he used excessive force—and I will define that to you later—or he was the aggressor, although he had no murderous intent at the

time of entering the fight, then he would be guilty of voluntary manslaughter.

The State in this case contends that you should be satisfied beyond a reasonable doubt of the defendant's guilt of murder in the first degree, or if not of that, one of the included offenses.

The State has offered evidence tending to show that on the first of July of this year, a Sunday, that John Griffin was in the Walnut Terrace area visiting his children, he being separated from the mother of the children, but he was visiting with

two of his children in the neighborhood; that

[ROA 112] the defendant appeared in the neighborhood in an automobile with John Dolby; that there was some movement by John Griffin to the automobile and some words exchanged; that Griffin left the automobile and the automobile moved on down the road; that the defendant got out of the automobile, came back in the direction of John Griffin and he had a pistol; that he shot John Griffin; that he later died as a result of that wound.

The State's evidence tends to show that the parties had been together earlier in the day; that there had been a fight in which John Griffin had broken or blooded the nose of the defendant; that it occurred some three or four hours before the shooting in Walnut Terrace.

The State's evidence tends to show that the defendant got a ride with Dolby to the Walnut Terrace area; that he had a pistol at the time of going there; that he got out of the automobile of Dolby and returned toward John Griffin after they had words as they passed in the automobile and the State's evidence tends to show that John Griffin did not have a weapon; was with his children or near his children and that he did not do any act or commit any act which would constitute provocation which would reduce the offense to manslaughter and that he did not do any act which would give a person reasonable grounds to believe that he was going to suffer any bodily harm whatsoever and particularly any serious bodily harm from John Griffin.

The State contends that any assault or fight between the parties earlier was so long before that any passion arising from

that would have subsided; and the State con-

[ROA 113] tends that the defendant, because he had been humiliated or because of a feeling of revenge, went to the scene to deliberately shoot John Griffin, and did.

The State contends that the defendant is guilty of murder in the first degree.

The State contends the surrounding circumstances are such as to infer both premeditation and deliberation and an intentional killing with a deadly weapon without provocation or legal excuse.

The State has offered evidence tending to show that in the opinion of the pathologist who examined John Griffin at the morgue of Wake Memorial Hospital that the cause of his death was a bullet wound that penetrated the abdominal aorta and died from bleeding as a result of that wound.

The State's evidence tends to show that the defendant at Walnut Terrace area did get out of an automobile and come back toward John Griffin; that he asked one of the children where her father was and as he was approaching John Griffin, going in his direction, Griffin came behind the witness McCoy attempting to hide or got behind the witness McCoy for sometime and that the defendant moved to one side and shot him.

The State contends that you should find the defendant guilty of murder in the first degree, or if not, should find him guilty of murder in the second degree beyond a reasonable doubt.

The defendant contends that he is not guilty. The defendant by his plea of not guilty denies the charge and each essential element of the offense. He denies the sufficiency of the State's evidence to satisfy you beyond a reasonable doubt of his guilt of any of the offenses.

[ROA 114] The defendant contends that the State's evidence does not show premeditation and deliberation and that you should not find those elements to exist and should not find him guilty of murder in the first degree. He contends that if you find that he did intentionally shoot Griffin and thereby cause his death that it was as a result of adequate provocation and further was justified by reason of self-defense.

The defendant has offered evidence tending to show that he had planned with friends to go fishing either on the Saturday or on Sunday. The time was not definite but that the plans were still on as far as the defendant knew and that it was the custom of the defendant and others with whom he fished to carry a gun along to shoot snakes and for that reason the defendant had the .38 pistol with him on this date.

His evidence tends to show that sometime in the afternoon at the King's Lounge, after an incident at a dice game at which

John Griffin appeared to get mad with the defendant, words were had at the King's Lounge about that incident; that Griffin asked the defendant outside and jumped on him before he had a chance to get outside and to protect himself and assaulted him so that he broke his nose.

The defendant's evidence tends to show that sometime after that, he contends a fairly brief time, that he was actually starting to visit a friend and got a ride with Dolby; that he had no intention of looking for John Griffin, had no idea that he would be at Walnut Terrace but was going there for other purposes; that he did go with Dolby to

[ROA 115] Walnut Terrace.

His evidence tends to show that before leaving the King's Lounge there was communicated to him a threat on the part of Griffin to get a gun and to shoot him; and his evidence tends to show that when they arrived at Walnut Terrace, that Griffin jerked open the door of the car, had some words about the previous incident and at Dolby's demand, Griffin shut the door and that they drove off and that he, the defendant, realizing that Dolby had to go home, decided that he would get out and leave the area and his evidence tends to show that as he got out of the automobile and was waiting for it to pass on he saw Griffin slipping up the street behind McCoy in his direction and he contends by reason of the past assault, by reason of the information that he had about Griffin's reputation and character and about his statement that he would get a gun, or that he tried to get a gun, that he had reasonable grounds to believe under those circumstances that he was about to suffer death or great bodily harm at the hands of Griffin.

He shot once in warning and then shot once in the direction of Griffin; that he left without seeing what had happened, except that Griffin appeared to go back the other way; that he disposed of the gun and went home and after making some efforts and inquiries about Griffin and finding that he was dead, he gave himself up at the Magistrate's Office and made statements as to what had happened.

The defendant contends that he was justified by reason of self-defense in any shooting and should not be found guilty of any criminal offense arising out of the death of John Griffin.

As I have said, Members of the Jury, I have

[ROA 116] given you those things which must be shown to establish a defense of self-defense. It is neces-

sary that I give you some more statements of the law with reference to self-defense. One who acts in self-defense when it is necessary to prevent some bodily harm to himself—one may act in self-defense when it is not necessary to prevent bodily harm to himself if he believes it to be necessary and has reasonable grounds for that belief. One may only kill in defense of himself when it is necessary to prevent death or great bodily harm or even though it is actually not necessary to prevent death or great bodily harm if he believes it to be necessary to and has reasonable grounds for that belief. A jury, and not the person charged, is to determine the reasonableness of the belief upon which he acted but the jury must judge the reasonableness of this belief by the facts and circumstances as they appeared to the defendant at the time of the alleged killing.

If a person is without fault and a felonious assault is made upon him, that is, an assault with an apparent intent to kill or do serious bodily harm, then he is not required to retreat but may stand his ground and if he kills his assailant and it was necessary to do so or reasonably appeared necessary for him to do so to save his life or to protect himself from great bodily harm, that would be excusable homicide. Ordinarily the law does not justify the use of a deadly weapon to repel a simple assault; that is, an assault without the apparent intent to kill or do serious bodily harm.

And if one kills another in repelling a simple assault under ordinary circumstances he would be guilty of voluntary manslaughter at least.

[ROA 117] This rule does not apply, however, where the jury finds that the use of such a weapon was or reasonably appeared to be necessary to save the person assaulted from great bodily harm. The right of self-defense may in acceptable circumstances arise from the fierceness of the assault, the position of the parties, differences between their relative size and strength, or from facts known to the defendant which give him reasonable apprehension that he is about to suffer death or great bodily harm although no deadly weapon is apparent.

If a simple or an assault without apparent intent to do serious bodily harm is made on a person, he is required to retreat as far as possible before he may kill his adversary in self-defense. If there is any way of escape open to him, he may not stand his ground and kill his adversary. And in the exercise of the right

of self-defense more force must not be used than is reasonably necessary under the circumstances and if excessive force is used, the defendant would be guilty of voluntary manslaughter. The means for force which a person is justified in using in self-defense depends upon the circumstances of the attack and in no case exceeds the bounds of defense or prevention but if the one attacked uses only such force as reasonably appears necessary to him under the circumstances to repel the attack and save himself from death or great bodily harm, it would be justifiable or excusable homicide. The question for the jury to decide is whether the defendant, if he used the force which resulted in the death of the deceased, had under all the circumstanes reasonable cause to believe and did believe that this amount of force was necessary to protect himself from impending danger or great bodily harm.

[ROA 118] The defendant contends that he had been wrongfully assaulted by Griffin; that he had reason to believe that Griffin might have armed himself, that Griffin appeared to be advancing upon him behind the shield of McCoy and that under those circumstances he did have reasonable grounds to believe and did believe that he was about to suffer such serious bodily harm from Griffin that only the use of dead force, that is, a shooting, would protect himself from great bodily harm.

He contends that you should be satisfied of those facts and should find him not guilty of the charge, or of any charge against him.

The State contends upon the plea of self-defense that there was no evidence that Griffin was at this time making any assault on the defendant or threatening him with any assault; that there was no circumstance from which the defendant might reasonably have believed that he was about to suffer any death or great bodily harm and the State contends that the right of self-defense did not exist but the State contends on the other hand that it was a deliberate and planned killing on the part of the defendant and unjustified by any legal grounds and unprovoked in any manner which would reduce it to any lesser offense or justify it all together.

Members of the Jury, there has been some evidence tending to show that the deceased, John Griffin, had some reputation for

danger and violence. He was believed to be a person who would commit dangerous acts. One witness expressed "Will jump on you from behind." Such evidence is evidence which you will consider in determining the reasonableness of any apprehension under which the defendant acted. Likewise, any evidence of threats of violence communicated to the defendant as having been made by the deceased is evidence which you will consider in determining the reasonableness of any apprehension under which he acted.

[ROA 119]

The defendant has offered evidence, Members of the Jury, as to his general reputation in the community. Certain witnesses testifying to their knowledge his reputation was good in the area where they knew him.

The State in cross examination of the defendant has brought out certain circumstances relating to prior criminal offenses of the defendant. Where a defendant testifies as a witness and offers evidence as to his reputation for good character, the jury may consider that in two aspects—is to consider it in two aspects: One, the defendant's character is a circumstance bearing upon the weight to be given his testimony as a witness along with all other circumstances which may bear upon that.

Two, where he offers evidence of his good character the evidence is also to be considered by you as substantive evidence bearing directly upon his guilt or innocence of the charge upon the theory that a person of good character and reputation is unlikely to do a wrongful or criminal act inconsistent with his reputation and character.

Any evidence offered by the State as to the defendant's conviction of criminal offenses in the past is evidence to be considered by you only in determining whether he was a person of good character and reputation.

Members of the jury, in these instructions I have only referred to so much of the evidence as appeared proper to give you the rulings of law applying in the case. I have not attempted to try to summarize or recapitulate the testimony of each witness or to refer to all of the evidence. My failure to mention some part of the evidence does not mean that it should not be considered but you should consider all of the evidence in arriving at your verdict.

[ROA 120]

My statement of what some of the evidence may tend to show, either in behalf of the State or of the defendant, is in

no way an expression as to whether that has been proved to be a fact or not, it being entirely for your determination and not mine what has been proved to be a fact in the case and you should not concern yourself with the judge's opinion as to what the evidence, what the facts are, or as to what your verdict should be in arriving at a verdict.

And my statement of what the contentions of the parties may be, the State or of the defendant, is in no way intended as a limitation upon any of the contentions which you should consider in arriving at your verdict. You should consider every contention, both for the State and for the defendant, which fairly arises in your mind upon the evidence in reaching a verdict whether argued by counsel or not or mentioned in these instructions or not.

I instruct you, Members of the Jury, that if you find from the evidence beyond a reasonable doubt that on or about the first of July of this year the defendant, Jesse Thurman Fowler, did intentionally and without justification or excuse shoot John Griffin with a pistol and thereby proximately caused his death and that Jesse Thurman Fowler then intended to kill John Griffin and that he acted with malice and premeditation and deliberation, if you find all of those facts to exist beyond a reasonable doubt, it would be your duty to return a verdict of guilty of murder in the first degree. If you do not so find or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty of murder in the first degree.

[ROA 121]

If you do not find the defendant guilty of murder in the first degree, you must determine whether he is guilty of murder in the second degree. Upon that charge if you find from the evidence beyond a reasonable doubt that on or about the first of July of 1973, Jesse Fowler did intentionally and with malice shoot John Griffin with a pistol thereby proximately causing his death, then nothing else appearing, it would be your duty to return a verdict of guilty of murder in the second degree. However, if you do not so find, or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty of murder in the second degree.

If you do not find the defendant guilty of murder in the second degree, you must consider whether he is guilty of voluntary manslaughter. And upon that charge if you find from the evidence beyond a reasonable doubt that he did on the day

be required to deliberate. The twelve of you may retire to the jury room and make up your verdict.

(Jury retires for deliberation at 2:30 p.m.)

(Jury returns to courtroom at 3:30 p.m.)

COURT. Let the jury come into their seats.

(Jury takes seat in jury box.)

COURT. You have reached a verdict, ladies and gentlemen?

FOREMAN. Yes, sir.

COURT. You may proceed to take the verdict.

CLERK. Ladies and gentlemen, answer to your names.

(Panel of twelve answer to their names.)

CLERK. Have you all agreed upon your verdict?

FOREMAN. Yes, ma'am.

CLERK. Who will speak for you?

FOREMAN. I will speak.

CLERK. Please stand. Jesse Thurman Fowler, stand up. Ladies and gentlemen, look upon the prisoner, what say you for your verdict? Do you find the defendant, Jesse Thurman Fowler, guilty of murder in the first degree, as charged; or guilty of murder in the second degree; or guilty of voluntary manslaughter; or not guilty?

[ROA 124]

FOREMAN. We, the jury, find the verdict to be guilty of first degree murder as charged unanimously.

CLERK. Harken into [sic] your verdict as the Court recordeth. You say that Jesse Thurman Fowler is guilty of murder in the first degree as charged. So say you all?

Mr. BROOKS. Your Honor, we move that the jury be polled.

COURT. Members of the jury, the defendant has asked that the jury be polled, which means that each of you will be asked individually some questions about your verdict. Please answer to your names and answer the Clerk's questions audibly.

(Clerk polled the jury individually and all assented to verdict as returned by the foreman in open court.)

Mr. BROOKS. At this time I would like to move that the verdict be set aside as against the weight of the evidence.

COURT. Motion denied and exception.

Mr. BROOKS. Yes, sir.

COURT. Any other motion prior to judgment?

Mr. BROOKS. I believe, that is all at this time, Your Honor.

COURT. Judgment will not be pronounced today but will be pronounced at 9:30 tomorrow morning. The defendant is remanded to custody until that time.

in question shoot John Griffin proximately causing his death but you are satisfied that he killed him without malice in the heat of sudden passion lawfully aroused by adequate provocation, as I have defined that to you, or if you find—that is, satisfied, not beyond a reasonable doubt but satisfied that although he believed that it was necessary to shoot John Griffin to protect himself, he did not have reasonable ground for that belief, then it would be your duty to return a verdict of guilty of voluntary manslaughter.

If, although you are satisfied beyond a reasonable doubt that the defendant did intentionally shoot John Griffin and thereby proximately caused his death, if you are satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable ground to believe and did believe that he was about to suffer death or serious bodily harm at the hands of John Griffin, and under those circumstances he used only such force as reasonably appeared necessary under the circumstances, then he would be justified by reason of self-defense and it would be your duty to return a verdict of not guilty.

[ROA 122]

Members of the Jury, your verdict must be unanimous. All twelve of you must agree upon a verdict. In the jury room you should select a foreman to lead your discussion and to report for you and when you have reached a verdict, you will indicate it by knocking. The Court will receive you and the clerk will take the verdict. The foreman stating what your findings are.

Members of the Jury, since it is nearly the lunch hour we will recess for lunch before beginning your deliberation. Come back at 2:30 and you will, of course, carefully observe the caution you have had before during the lunch hour. Since you will not be sent out until after lunch, the alternate will remain under the same instructions and will come back after lunch. If at that time all twelve of the original jurors are still here and healthy, the alternate will be excused, but you remain for now as a member of the jury. We will take a recess until 2:30.

[ROA 123] [VERDICT]

9/26/73 p.m.

COURT. Members of the jury, since the twelve of you, who are original jurors, have made it to this point, the alternate will not

JUDGMENT

9–27–63 a.m.

COURT. Are you ready to pray judgment?

Mr. CALDER. Yes, sir. Case number 73–CR–41907. Jesse Thurman Fowler. The State would pray judgment at this time.

[ROA 125]

COURT. Anything else in behalf of the defendant?

Mr. BROOKS. Your Honor, at this time, if it please the Court, we would like to enter a motion in arrest of judgment.

COURT. Any particular grounds, Mr. Brooks?

Mr. BROOKS. No, sir, not to be stated now.

COURT. Motion is denied and exception for the defendant.

Mr. Fowler, would you stand up. Mr. Fowler, you have been tried on good and competent evidence. Saw no signs of anybody out to get you or anybody deliberately wanting to lie on you or in anyway tell anything that didn't appear to them to be the truth. The evidence was strong and sufficient for the jury to find that you were guilty of murder in the first degree and it has so found. The penalty is extreme and the purpose of having any penalty and especially the death penalty is to try to teach others that the kind of life you chose to live, and particularly the act that you finally did, will not be accepted by society. The word has got to get out through the lobby of the courthouse and King's Lounge and everywhere else that people that are inclined to be free with weapons and free with other people's lives that society is not going to permit this kind of conduct. So you do face the extreme penalty provided by law for murder in the first degree. Before sentence is pronounced, is there anything that you want to say that hadn't been said for you?

Mr. FOWLER. Naw.

COURT. Sir?

Mr. FOWLER. No, sir.

COURT. Jesse Thurman Fowler, you have been indicted, tried and convicted by a jury of your county of the murder in the first degree of one John Griffin. The law prescribes in section 14–17 of the General Statutes of North Carolina that the punishment for your crime is death. The judgment of the Court therefore is that you be remanded to the Common Jail of Wake County and there remain until the adjournment of this court. IT IS ORDERED that you be conveyed by the High Sheriff of Wake

[ROA 126]

County to the State Prison of the State of North Carolina at Raleigh, North Carolina, and by such sheriff be delivered to the Warden of said prison; and IT IS FURTHER ORDERED AND ADJUDGED AND DECREED that you remain in the custody of said Warden until Friday, the 30th day of November, 1973, and that on said day and between the hours of 10:00 o'clock in the forenoon and 3:00 o'clock in the afternoon that you be taken by the said Warden to the place provided for execution in said prison; and IT IS FURTHER ORDERED AND ADJUDGED that the said Warden, Deputy Warden or such other person as may be designated according to law, then and there take you the said Jesse Thurman Fowler into the permanent death chamber which has been provided in said prison and there and therein cause you to inhale lethal gas of sufficient quantity to cause death to be administered to you and to continue said inhaling of said lethal gas by you until your death.

Anything in behalf of the defendant, Mr. Brooks?

Mr. BROOKS. No, Your Honor. We would like to enter notice of appeal.

COURT. The record will show that notice of appeal was given in open court; further notice is waived. The Court in its discretion denies appearance bond. Has he heretofore been found indigent, Mr. Brooks?

Mr. BROOKS. No, sir. I am retained by the family.

COURT. You are employed. The defendant is allowed 75 days to perfect and serve case on appeal. The solicitor is allowed 25 days thereafter for countercase or exceptions. It will be ordered that the defendant having been convicted of the capital felony that he be committed to the State Prison for safekeeping pending his appeal. Appeal bond is set at $200.00.

[ROA 127]

Mr. BROOKS. Yes, Your Honor. Thank you.

COURT. He is remanded to your custody, Mr. Sheriff.

Finis.

[ROA 127] GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

* * * * *

[R 131] 9. The imposition and the carrying out of the death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19 and 24 of the Constitution of the State of North Carolina.

Exceptions Nos. 2 (R p 9), 3 (R p 11), 4 (R p 12), 5 and 6 (R p 14).

STATE OF NORTH CAROLINA

v.

JESSE THURMAN FOWLER

Supreme Court of North Carolina, No. 34, April 10, 1974
(285 N.C. 90, 203 S.E. 2d 803)

On an indictment proper in form, defendant was tried and convicted of murder in the first degree of John Griffin. Defendant appeals from a judgment imposing a sentence of death.

The State's evidence tends to show that around 6:30 or 7:00 o'clock on the evening of 1 July 1973 John Griffin, the deceased, was with his two children in front of a neighbor's house at 1300 Branch Street in Raleigh, North Carolina. While Griffin was visiting with the neighbor, a car in which defendant was a passenger drove up and stopped fairly close to where Griffin was standing. Griffin walked over to the car, snatched the car door open, and said to defendant, "I don't want to fight you no more. I want you to go on home." Griffin then turned to the driver, Johnny Fraizer Dolby, and asked him to take defendant home, and Dolby agreed to do so. After Dolby had driven only a short distance down the street, defendant insisted that he stop the car and let him out. Dolby complied with defendant's request, and defendant got out of the car and started walking toward Griffin. When the two were fairly close, defendant pulled a pistol and shot at Griffin twice, hitting him once in the stomach. Griffin fell and defendant left the scene of the shooting and

went home. At the time defendant shot Griffin, Griffin had no weapon of any kind in his hand and no weapon was found on or near his body after the shooting.

The police were called and Griffin was taken to a hospital where later that night he died as a result of the gunshot wound. A few hours after the shooting, defendant, upon the urging of his wife and a friend, went to the Raleigh Police Department to explain what had happened. At the police station defendant was informed of his constitutional rights and indicated that he understood them and that he did not want an attorney present. He also signed a waiver of rights form that was introduced at trial. Defendant said that he wanted the police to know that he was drunk when he shot Griffin. According to Detective D. C. Williams of the Raleigh Police Department, defendant explained to the police that he had gotten drunk on 30 June 1973 and had gotten up the next morning, 1 July 1973, and started drinking again. Defendant's statement to the police also revealed that on 1 July 1973 defendant had gone over to Sylvester Jones' house where a crap game was in progress. There defendant and Griffin got into an argument about a ten dollar bill, but nothing happened as a result of this argument. Around 6 p.m. defendant left the game and went to King's Lounge on Rock Quarry Road. Griffin arrived at the Lounge later, and shortly after Griffin's arrival he and defendant resumed their argument about the ten dollar bill. Griffin asked defendant to come outside with him, and as defendant was walking out, Griffin hit him in the nose, knocking defendant down and breaking his nose. Defendant told the police that at this time he had a .38 caliber pistol in his pocket. He left the King's Lounge and went to his home for awhile, and then decided to catch a ride and go see a friend who lived in the vicinity where the shooting occurred. When he arrived in the area, he saw Griffin, and Griffin came over to the car and wanted to fight defendant again. Defendant then persuaded Dolby, the driver, to let him out so that Dolby would not get into any trouble. When defendant got out he started walking away but Griffin came toward him. Defendant shot at him but missed, then shot again and hit him.

All the State's witnesses testified that although defendant's eyes were bloodshot at the time of the shooting incident and when he made his statement, he appeared to be in complete control of his mental and physical faculties and was not drunk.

Much of the defendant's evidence tended to corroborate the statement defendant had given to the police on the night following the shooting, except as to that part when he stated he was drunk. His evidence further tended to show that he and some of his friends had planned to go fishing on the day of the shooting, and that it was defendant's custom to carry a pistol with him when he went fishing to shoot snakes; that he had his .38 caliber pistol with him all day for that purpose and had not gotten it after his scuffle with Griffin at the King's Lounge. Defendant also testified that immediately after his fight with Griffin at the King's Lounge, Charles Gene Rogers came up to him and told him, "Man, you better go ahead on because John Griffin is trying to get a pistol to kill you." Rogers corroborated this testimony.

Defendant testified concerning the events leading up to the shooting substantially as follows: Before his fight with Griffin he had been drinking some beer at the King's Lounge. Following the fight defendant decided to go over to an apartment complex known as Walnut Terrace to see his sister-in-law. At the time defendant did not know that Griffin would be in the area, and he was not out looking for Griffin. He got two rides to the complex, the last being with Johnny Fraizer Dolby. When Dolby got to the Walnut Terrace area, he and defendant saw Griffin on the street. Griffin came over to the car, snatched the car door open and told defendant, "I don't want to fight you no more. So why don't you go on home." Griffin then shut the car door, and Dolby drove down the street after telling defendant that he would take him home. After the car had gone only a short distance, defendant told Dolby to stop the car and let him out. Defendant testified that he did this because he wanted to leave the area the "easiest" way possible because Griffin had "popped up" in the area. Defendant got out of the car and started crossing the street. At this point he looked down the street and saw Griffin crouched down behind Charles McCoy. McCoy was walking up the street in the direction of defendant, and Griffin was "crouched down tipping up the street behind" McCoy. Suddenly, Griffin pushed McCoy out of the way so that Griffin and defendant were facing each other. Then Griffin said, "Nigger, I am going to make you use what you have got in your pocket." At this point defendant got his pistol out of his pocket and shot it once in the air hoping Griffin would turn back. Griffin did not turn back and so defendant shot at him a

second time, this time hitting him in the stomach. Defendant stated that at the time he shot Griffin he was thinking about having heard that Griffin was looking for a gun and that he was just trying to keep Griffin off of him; he did not shoot to kill him.

Atty. Gen. Robert Morgan and Asst. Atty. Gen. Sidney S. Eagles, Jr., Raleigh, for the State.

Chambers, Stein, Ferguson & Lanning by Charles L. Becton, Chapel Hill, for defendant appellant.

MOORE, Justice.

Assignments of error Nos. 1, 2, 3, 6, and 7 are not brought forward and argued in defendant's brief, and consequently these assignments are deemed abandoned. Rule 28, Rules of Practice in the Supreme Court; State v. Crews, 284 N.C. 427, 201 S.E. 2d 840 (1974); *State* v. *McLean*, 282 N.C. 147, 191 S.E. 2d 598 (1972). However, in view of the gravity of the punishment in this case, we have carefully reviewed these assignments but find them to be without merit.

By his fourth assignment of error defendant asserts that "[t]he trial court erred in its instructions to the jury in that the trial court: (1) misstated the law; (2) expressed opinions to the jury; and (3) inaccurately summarized the evidence and contentions of the State and of the defendant."

Under this assignment defendant first contends that the trial court in discussing premeditation and deliberation expressed an opinion contrary to G.S. § 1–180 that there was no evidence of provocation in the case. That portion of the charge to which defendant points in support of this contention is as follows:

> Premeditation and deliberation may be shown by circumstances and in determining whether there was such premeditation and deliberation the jury may consider evidence *of the absence of provocation* and all other circumstances under which the homicide was committed. (Emphasis by defendant.)

This contention is without merit. Concerning premeditation and deliberation, the court stated:

> I have used the word "premeditation" and "deliberation." Those elements must be proved beyond a reasonable doubt before a verdict of murder in the first degree can be rendered against the defendant. The State may prove these elements in many ways. Ordinarily they are not susceptible of direct proof but may be inferred from

> circumstances such as ill will, previous difficulty between the parties, declarations of an intent to kill either before or after the inflicting of the fatal wound, or where the evidence shows that the killing is done in a brutal and ferocious manner.
>
> Premeditation and deliberation may be shown by circumstances and in determining whether there was such premeditation and deliberation the jury may consider evidence of the absence of provocation and all other circumstances under which the homicide was committed.
>
> In determining the question of premeditation and deliberation the jury must take into consideration the conduct of the defendant before and after and all attending circumstances in determining whether the act shall be attributed to premeditated design or sudden impulse.

Thereafter, the court fully defined premeditation and deliberation. When that portion of the charge to which defendant excepts is viewed in its context, it is apparent that the statement by the court was not an expression of an opinion that there was no evidence of provocation in this case. To the contrary, this instruction was a correct statement of the law in the case and was given by the court, as required by G.S. § 1-180, to assist the jury in reaching a verdict. It is in accord with many well-considered decisions of this Court. See *State* v. *Van Landingham*, 283 N.C. 589, 197 S.E. 2d 539 (1973); *State* v. *Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State* v. *DuBoise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State* v. *Hamby* and *State* v. *Chandler*, 276 N.C. 674, 174 S.E. 2d 385 (1970).

Defendant next contends that the manner in which the court summarized the evidence indicated to the jury that there was no provocation in the case. The paragraph in the charge complained of is as follows:

> The State's evidence tends to show that the defendant got a ride with Dolby to the Walnut Terrace area; that he had a pistol at the time of going there; that he got out of the automobile of Dolby and returned toward John Griffin after they had words as they passed in the automobile and the State's evidence tends to show that John Griffin did not have a weapon; was with his children or near his children and that he did not do any act or commit any act which would constitute provocation which would reduce the offense to manslaughter and that he did not do any act which would give a person reasonable grounds to believe that he was going to suffer any bodily harm whatsoever and particularly any serious bodily harm from John Griffin.

This recapitulation of the evidence is in substantial accord with the testimony in the case. In reviewing the evidence the court is not required to give a verbatim recital of the evidence but only a summation sufficiently comprehensive to present every substantial and essential feature of the case. If there are minor discrepancies, they must be called to the attention of the court in time to afford opportunity for correction, otherwise they are deemed to be waived and will not be considered on appeal. *State* v. *Thomas*, 284 N.C. 212, 200 S.E. 2d 3 (1973); *State* v. *Tart*, 280 N.C. 172, 184 S.E. 2d 842 (1971); *Northgate Shopping Center* v. *Highway Commission*, 265 N.C. 209, 143 S.E. 2d 244 (1965); 7 Strong, N.C. Index 2d, Trial § 33 (1968). No prejudicial error is shown by this statement. If defendant desired a more comprehensive statement of the evidence on this phase of the case, he should have requested it.

Under this same assignment defendant also contends that the trial court stated the following contention in such a manner that the jury could reasonably infer that this statement was the court's opinion:

> The State contends upon the plea of self-defense that there was no evidence that Griffin was at this time making any assault on the defendant or threatening him with an assault; that there was no circumstance from which the defendant might reasonably have believed that he was about to suffer any death or great bodily harm. * * *

This contention was amply supported by the State's evidence. Again, if defendant had any objection to this contention, he should have stated it at the time. *State* v. *Thomas*, supra; *State* v. *Tart*, supra; *Emanuel* v. *Clewis*, 272 N.C. 505, 158 S.E. 2d 587 (1968); Strong, N.C. Index 2d, Trial § 34 (1968).

Additionally, defendant contends that the manner in which the trial court stated defendant's contentions lends credence to defendant's contention that the trial court gave unequal stress to the contentions for the State. The statement in the charge complained of is as follows: "The defendant's evidence tends to show that sometime after that, he contends a fairly brief

on or about the first of July of this year the defendant, Jesse Thurmon Fowler, did intentionally and without justification or excuse shoot John Griffin with a pistol and thereby proximately caused his death and that Jesse Thurman Fowler then intended to kill John Griffin and that he acted with malice and premeditation and deliberation, if you find all of those facts to exist beyond a reasonable doubt, it would be your duty to return a verdict of guilty of murder in the first degree. If you do not so find or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty of murder in the first degree.

If you do not find the defendant guilty of murder in the first degree, you must determine whether he is guilty of murder in the second degree. Upon that charge if you find from the evidence beyond a reasonable doubt that on or about the first of July of 1973, Jesse Fowler did intentionally and with malice shoot John Griffin with a pistol thereby proximately causing his death, then nothing else appearing, it would be your duty to return a verdict of guilty of murder in the second degree. However, if you do not so find, or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty of murder in the second degree.

In instructing on manslaughter the court said:

> If you do not find the defendant guilty of murder in the second degree, you must consider whether he is guilty of voluntary manslaughter. And upon that charge if you find from the evidence beyond a reasonable doubt that he did on the day in question shoot John Griffin proximately causing his death but you are satisfied that he killed him without malice in the heat of sudden passion lawfully aroused by adequate provocation, as I have defined that to you, or if you find—that is, satisfied, not beyond a reasonable doubt but satisfied that although he believed that it was necesary to shoot John Griffin to protect himself, he did not have reasonable ground for that belief, then it would be your duty to return a verdict of guilty of voluntary manslaughter.
>
> If, although you are satisfied beyond a reasonable doubt that the defendant did intentionally shoot John Griffin and thereby proximately caused his death, if you

time, that he was actually starting to visit a friend and got a ride with Dolby. * * *" Defendant stated that here the court, "as if editorializing," inserted "he contends a fairly brief time." Defendant had testified that approximately thirty minutes had elapsed from the time the deceased jumped on him and broke his nose at the King's Lounge to the time he saw the deceased at Walnut Terrace. The State's evidence was that three to four hours had elapsed. Therefore, the court's statement of defendant's contention was in accord with defendant's evidence and was in fact favorable to him. No prejudice appears.

By assignment of error No. 3 defendant asserts that "[t]he trial court erred by failing to give a full instruction on the circumstances under which the jury could return a verdict of not guilty. * * *" Defendant contends that the charge limited in effect the verdict of not guilty to a finding by the jury that defendant killed the deceased in self-defense, and that under the decisions in *State* v. *Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971), and *State* v. *Ramey*, 273 N.C. 325, 160 S.E. 2d 56 (1968), the court erred in failing to instruct the jury that if the State failed to satisfy it from the evidence beyond a reasonable doubt that the defendant was guilty of murder in the first degree or murder in the second degree or manslaughter, the jury should return a verdict of not guilty.

This assignment and the exceptions on which it is based do not comply with well-established appellate rules. Exceptions Nos. 34 and 35 appear at the end of the charge. Neither identifies by brackets or otherwise any particular portion of the charge to which exception is taken. These exceptions are ineffectual as bases for assignments of error in that they do not point out specific portions of the charge as erroneous. Neither does this assignment quote the portion of the charge to which defendant objects. Too, where the assignment of error is based on failure to charge, it is necessary to set out appellant's contention as to what the court should have charged. *State* v. *Crews*, supra; *State* v. *Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970); *State* v. *Wilson*, 263 N.C. 533, 139 S.E. 2d 736 (1965). Even though this assignment does not comply with the well-established rules, since a death sentence is involved we have elected to discuss defendant's contention.

The court correctly instructed the jury as to murder in the first degree and murder in the second degree as follows:

> I instruct you, Members of the Jury, that if you find from the evidence beyond a reasonable doubt that

> are satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable ground to believe and did believe that he was about to suffer death or serious bodily harm at the hands of John Griffin, and under those circumstances he used only such force as reasonably appeared necessary under the circumstances, then he would be justified by reason of self-defense and it would be your duty to return a verdict of not guilty.

In the above-quoted portions of the charge the court, after instructing the jury as to what they must find before returning a verdict of guilty of either murder in the first degree or second degree, concluded the instruction as to each of those offenses as follows: "However, if you do not so find, or have a reasonable doubt as to any one or more of those things, you would not return a verdict of guilty. . . ." On the charge as to manslaughter no comparable instruction was given to the effect that if the State failed to satisfy the jury from the evidence beyond a reasonable doubt that defendant did on the day in question shoot John Griffin thereby proximately causing his death, then the jury should return a verdict of not guilty. As stated by Justice Bobbitt (now Chief Justice) in *State* v. *Ramey*, supra:

> In our opinion, and we so decide, defendant was entitled to an explicit instruction, even in the absence of a specific request therefor, to the effect the jury should return a verdict of not guilty if the State failed to satisfy them from the evidence beyond a reasonable doubt that a bullet wound inflicted upon Mabry by defendant proximately caused his death. The trial judge inadvertently failed to give such instruction. The necessity for such instruction is not affected by the fact there was plenary evidence upon which the jury could base a finding that a bullet wound inflicted upon Mabry by defendant proximately caused his death. *State* v. *Redman*, supra. [217 N.C. 483, 8 S.E. 2d 623 (1940)]." *Accord, State* v. *Woods*, supra.

As in *Ramey*, the trial judge in the present case inadvertently failed to give such instruction. This was error. However, in this case it is not such error as to require a new trial.

In *State* v. *Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969), defendant was on trial for murder, and the jury was instructed

that it could return a verdict of guilty of murder in the first degree, guilty of murder in the second degree, guilty of manslaughter, or not guilty. The jury was correctly instructed on the law pertaining to murder in the first degree and murder in the second degree, but an erroneous instruction was given on the charge of manslaughter. The jury returned a verdict of guilty of murder in the first degree. In finding no error in the trial Justice Sharp, for the Court, stated:

> Erroneous though the challenged instruction was, it does not entitle defendant to a new trial for, demonstrably, it was harmless. First, the verdict of murder in the first degree established that defendant had unlawfully killed Sawyer with malice, premeditation, and deliberation. *State* v. *Moore*, 275 N.C. 198, 166 S.E. 2d 652. Defendant assigns no error in the charge as it related to murder in the first or second degree. * * * Ordinarily, when the jury is instructed that it may find defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty, and the verdict is guilty of murder in the second degree, an error in the charge on manslaughter will require a new trial. In such event it cannot be known whether the verdict would have been manslaughter if the jury had been properly instructed. But where, as here, the jury was properly instructed as to both degrees of murder and yet found defendant guilty of murder in the first degree rather than the second degree, it is clear that error in the charge on manslaughter was harmless. In *State* v. *Munn*, 134 N.C. 680, 47 SE 15, the jury found "that beyond all reasonable doubt the prisoner slew the deceased willfully, deliberately, and with premeditation, and was guilty of murder in the first degree. The State (had) thus satisfied them of facts raising the crime above murder in the second degree, which only was presumed from the (intentional) killing with a deadly weapon. If there were error in the charge as to mitigation below murder in the second degree, it was therefore immaterial error."

Similarly, in the present case when the jury became convinced beyond a reasonable doubt that defendant, after deciding to take Griffin's life, intentionally and unlawfully shot and killed him, the error in the charge below murder in the second degree was immaterial error. This assignment is overruled.

By assignment of error No. 5 defendant also contends the trial court erred in failing to instruct the jury as to the law on intoxication as it relates to the facts in this case. Again, the assignment does not set out what the court should have charged. See *State* v. *Crews*, supra. We have, however, considered defendant's contention.

Voluntary intoxication is not a legal excuse for crime. *State* v. *Bunn*, 283 N.C. 444, 196 S.E. 2d 777 (1973); *State* v. *Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968). Although it is no excuse for crime, where a specific intent is an essential element of the offense charged, the fact of intoxication may negate the existence of that intent *State* v. *Propst*, supra. If a person on trial for murder in the first degree was so drunk at the time he committed the homicide charged in the indictment that he was utterly incapable of forming a deliberate and premeditated purpose to kill, and essential element of murder in the first degree is absent. *State* v. *Bunn*, supra. In such a situation it is said that " 'the grade of offense is reduced to murder in the second degree.' " *State* v. *English*, 164 N.C. 497, 511, 80 S.E. 72, 77 (1913).

While there was evidence that defendant was drinking, there was no evidence that he was drunk or intoxicated except defendant's exculpatory statement to Detective Williams. All the State's witnesses who saw him at the time of the shooting or when he made his statement to Detective Williams testified that defendant appeared to be in complete control of his mental and physical faculties and was not intoxicated or drunk. None of defendant's numerous witnesses who saw him testified that he was drunk at anytime during the day on Sunday, July 1, up to and including the time of the shooting, or after the shooting until defendant surrendered to the police. Defendant testified in his own behalf and recited in minute detail his activities on Saturday, June 30, and Sunday, July 1. At no time in his testimony did he state that he was intoxicated or that his mind was in any manner impaired or affected by anything he had had to drink. His only defense was self-defense, and he did not request any instruction on intoxication as a defense to first degree murder. We hold, therefore, that there was not sufficient evidence of intoxication in this case to require an instruction as to the law on intoxication as a defense to murder in the first degree. See *State* v. *Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971); *State* v. *Hamby* and *State* v. *Chandler*, supra; *State* v. *Bunton*, 247 N.C. 510, 101 S.E. 2d 454 (1958).

Apparently in an attempt to simplify matters on appeal, the State and defense counsel entered into the following stipulation:

> [We] hereby stipulate and agree that upon the voir dire of the jury the following transpired at the trial of this matter.
>
> 1. That the jury voir dire was not transcribed.
>
> 2. That the State questioned the prospective jurors with regard to their attitudes about the death penalty and advised them that death would be the penalty as a result of a first degree murder verdict.
>
> 3. That two jurors were excused for cause because of their views on capital punishment.

Now defendant, under his eighth assignment of error, asserts that the death qualification of the jury wherein the jury was advised that death would be the penalty upon a first degree murder verdict, the exclusion of death-scrupled jurors from appellant's jury and the failure of the trial court to have the jury *voir dire* transcribed violated appellant's Sixth Amendment right to a jury that reflects a fair and representative cross section of the community.

Defendant first contends under this assignment that the Sixth Amendment to the United States Constitution mandates that no venireman be excluded for cause because of his views on the death penalty, regardless of what his views may be. Therefore, defendant argues, the trial court committed error in permitting the veniremen to be questioned about their beliefs on capital punishment and in allowing the State to advise the prospective jurors that death is the penalty in a first degree murder conviction.

The Supreme Court of the United States in *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968), decided otherwise. In *Witherspoon* the United States Supreme Court held that the sentence of death may not be carried out if the jury that imposed it was chosen by excluding veniremen for cause simply because they had general objections to the death penalty or expressed conscientious or religious scruples against infliction of the death penalty. But in footnote 21 of that opinion it is stated:

> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen

> who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Since *Witherspoon* this Court has consistently held that if a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. *State* v. *Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State* v. *Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972); *State* v. *Watson*, 281 N.C. 221, 188 S.E. 2d 289 (1972); *State* v. *Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State* v. *Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971); *State* v. *Dickens*, 278 N.C. 537, 180 S.E. 2d 844 (1971); *State* v. *Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969).

Under these decisions it is permissible to ask a prospective juror about his beliefs on capital punishment in order that the State, as well as the defendant, may have a trial by an impartial jury. To achieve this impartial jury the State is allowed to challenge for cause any juror who would automatically vote against a verdict that would require the imposition of the death penalty without regard to the evidence that might be developed at the trial of the case, or whose attitude towards the death penalty would prevent him from making an impartial decision as to defendant's guilt. As stated by this Court in State v. Doss, supra, "a venireman should be willing to consider all the penalties provided by State law and he should not be irreparably committed before the trial has begun to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceeding." See also *State* v. *Childs*, 269 N.C. 307, 152 S.E. 2d 453 (1967). Justice Higgins in *State* v. *Spence*, 274 N.C. 536, 539, 164 S.E. 2d 593, 595 (1968), stated the reason for challenge as follows:

> According to the Federal Court decisions 'the function of challenge is not only to eliminate extremes of partiality on both sides but to assure the parties that the jury before whom they try the case will decide on the basis of the evidence placed before them and not otherwise.' The purpose of challenge should be to guarantee 'not only the freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the State the scales are to be evenly held.' *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759; *Turberville* v. *United States*, 112 U.S.App.D.C. 400, 303 F. 2d 411 (cert. den. 370 U.S. 946); *Logan* v. *United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429; *Hayes* v. *Missouri*, 120 U.S. 68, 7 S.Ct. 350, 30 L.Ed. 578.

We hold that in a capital case it is proper to inquire into a prospective juror's views on capital punishment in order to determine his competency to serve in an impartial manner. See *State* v. *Crowder*, N.C. 203 S.E. 2d 38 (1974).

Under this same assignment of error defendant also contends that the trial court erred in not ordering the court reporter to transcribe the jury *voir dire*, and that such failure requires that defendant's death sentence be vacated. In making this contention, defense counsel in his brief points to the stipulation entered into with the State whereby it was stipulated that the jury *voir dire* was not transcribed and that two jurors were excused for cause because of their views on capital punishment.

> A stipulation is a judicial admission. [Citations omitted.] It has been said in North Carolina that courts look with favor on stipulations, because they tend to simplify, shorten, or settle litigation as well as saving cost to the parties. [Citations omitted.]
>
> * * * * *
>
> * * * "[S]tipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished. * * *" 36 Cyc. 1291, 1292. * * * *Rickert* v. *Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972).
>
> * * * "While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision. * * *" *State* v. *Powell*, 254 N.C. 231, 118 S.E. 2d 617 (1961). On its face the stipulation in the present case is not definite and

certain. The stipulation only notes that two jurors were excused for cause "because of their views on capital punishment," but does not reveal whether the State or defendant moved for their exclusion or what their views on capital punishment might have been. As defense counsel in his brief states:

"No stipulation or admission based on recollection can reflect the many possible answers given in response to the death-qualifying questions. No reflection now can show this Court how resolute or irresolute an answer may have been. Did either of the excused jurors voice general objections to the death penalty or express conscientious or religious scruples against its infliction? Was an excused juror's response ambiguous? Was one of the jurors excused because he said that he could not vote for the death penalty in this particular case? We do not know the answer to these questions; there is no transcript."

In effect it is now defendant's position that the stipulation entered into by defense counsel and the State is insufficient in that it does not provide this Court with an adequate basis for determining whether the two jurors allegedly excused for cause because of their views on capital punishment were properly excused under *Witherspoon* and the decisions of this Court cited above, and furthermore that it was error for the trial court not to order the *voir dire* examination of the jurors transcribed. We agree that the stipulation was deficient as contended by defendant. In order to determine whether the two jurors were in fact properly excused, this Court *ex mero motu* ordered that the court reporter's record of the *voir dire* examination as to all jurors in this case be transcribed and certified by the trial court to this Court, and that such transcript be made a part of the case on appeal. This was done. See Rule 19, Rules of Practice in the Supreme Court.

This sixty-five page transcript discloses that, contrary to the stipulation, no prospective juror was excused for cause by reason of his views on capital punishment. Although two prospective jurors who expressed some reservation as to capital punishment were excused, they were not excused for cause but were excused peremptorily by the State. Including these two peremptory challenges the State utilized seven of its permissible nine peremptory challenges, and defendant seven of his permissible fourteen. See G.S. § 9-21. Peremptory challenges are challenges that may be made according to the judgment

of the party entitled thereto, and the reason for challenging a juror peremptorily cannot be inquired into. *State* v. *Noell*, supra; *State* v. *Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969).

It is the primary duty of defense counsel to prepare and docket a true and adequate transcript of the record in the case on appeal in a criminal case. *State* v. *Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State* v. *Roux*, 263 N.C. 149, 139 S.E. 2d 189 (1964); G.S. § 15-180; G.S. § 1-282. It is also the duty of the solicitor to scrutinize the copy that the appellant serves upon him. If it contains errors or omissions, it is the solicitor's responsibility to file exceptions or countercase. *State* v. *Fox*, supra. If, as in the present case, defense counsel desires to take exception to the act of the court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the *voir dire* examination as to that juror in the case on appeal. He should not take exception to his own failure to prepare and docket a true and adequate transcript of the record in the case on appeal. Such action is not approved.

Since the complete record now before us discloses that no juror was excused by the State for cause due to his view on capital punishment, defendant's contention that the trial court erred in excusing jurors for cause is overruled, and his contention as to the failure of the trial court to order a transcript of the *voir dire* examination to be included in the case on appeal is no longer tenable.

Defendant by his final assignment of error contends that the death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, sections 19, 24, and 27 of the Constitution of North Carolina. He further contends that capital punishment in North Carolina is still imposed in a selective and arbitrary manner, in violation of *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972).

Defendant also adopts and incorporates by reference the contentions and citations of authority contained in the brief filed in *State* v. *Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), by the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae*, and the brief filed in *State* v. *Blackmon*, 284 N.C. 1, 199 S.E. 2d 431 (1973), by the North Carolina Civil Liberties Union

Legal Foundation Inc., as *amicus curiae*. Suffice it to say that the arguments advanced in this case were fully discussed and rejected in the opinions filed in those cases. Further discussion would serve no useful purpose.

In *State* v. *Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973), this Court declared that the death penalty is the sole and exclusive punishment for murder in the first degree committed in North Carolina after 18 January 1973. G.S. § 14–17. The murder for which this defendant has been convicted was committed on 1 July 1973. The death sentence, therefore, was not only proper but was the only one that the trial court could impose.

An examination of the entire record discloses that defendant has had a fair trial free from prejudicial error. The judgment imposd must therefore be upheld.

No Error.

Chief Justice Bobbitt, Justice Higgins and Justice Sharp dissent as to death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in *State* v. *Jarrette*, 284 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974).

Judgment, Supreme Court of North Carolina

Spring Term, 1974—No. 34—Wake County

State of North Carolina *v.* Jesse Thurman Fowler

This cause came on to be argued upon the transcript of the record from the Superior Court, Wake County: upon consideration whereof, this Court is of the opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Dan K. Moore, Justice, be certified to the said Superior Court, to the intent that proceedings be had therein in said cause according to law, as declared in said opinion.

It is considered and adjudged further that the defendant and surety to the appeal bond, U.S. Fidelity & Guaranty Co., do pay the costs of the appeal in this Court incurred, to wit, the sum of forty seven and no one hundredths dollars ($47.00) and execution issue therefore.

Certified to Superior Court, this 22 day of April, 1974.

Adrian J. Newton,
Clerk of Supreme Court.

(S) By FS,
Deputy Clerk.

In the Supreme Court of the United States

No. 73–7031

Jesse Thurman Fowler, petitioner

v.

North Carolina

On petition for writ of Certiorari to the Supreme Court of the State of North Carolina

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is herby, granted.

October 29, 1974.

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CORRECTED COPY

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1973

MICHAEL RODAK, JR., CLERK

No. 73-6877

HENRY N. JARRETTE,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6876

TOMMY NOELL,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6853

ALTON JAMES HENDERSON,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6878

ALBERT CROWDER, JR.,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6875

DAVID EARL DILLARD,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-7031

JESSE THURMAN FOWLER,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-7032

BILLY HONEYCUTT,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

* *

RESPONSE OF THE STATE OF NORTH CAROLINA
TO PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

* *

JAMES H. CARSON, JR.
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Dated: September 20, 1974

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THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6876

TOMMY NOELL,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6878

ALBERT CROWDER, JR.,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-7031

JESSE THURMAN FOWLER,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6853

ALTON JAMES HENDERSON,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-6875

DAVID EARL DILLARD,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

No. 73-7032

BILLY HONEYCUTT,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

* *

RESPONSE OF THE STATE OF NORTH CAROLINA
TO PETITIONS FOR WRITS OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

* *

Pursuant to Rule 23(5) of the Rules of the Supreme Court, Respondent files herewith its consolidated response to the captioned petitions for writs of certiorari to the Supreme Court of North Carolina. They each seek certiorari to the same court and involve an identical question, as well as other closely related questions.

The State of North Carolina, respondent, has no objection to this Court issuing writs of certiorari to the Supreme Court of North Carolina in the captioned cases limited to the single question of whether the State's imposition of death by administering lethal gas to duly convicted first degree murderers and rapists who consummate the rape by force and violence, constitutes "cruel and unusual" punishment within the meaning of the eighth amendment to the Constitution of the United States of America.

The respondent acknowledges there may be special and important reasons for granting the writs (Rule 19(1), Rules of the Supreme Court). Among these are: (1) This State's highest court has answered the foregoing federal question of substance in the negative and the question has not heretofore been directly determined by this Court; and (2) even though the Constitutionality of the death penalty per se has been heretofore recognized by this Court, the recent decision in Furman v. Georgia 408 U.S. 238, 33L.Ed. 2d 346, 92 S.Ct. 2726 (1972) has cast an uncertain light upon this Court's construction of the State's power to define criminal conduct and prescribe punishment for those engaging in such conduct, which power was specifically reserved to the States pursuant to the tenth amendment to the Constitution of the United States of America.

OPINIONS BELOW

The opinions of the Supreme Court of North Carolina in the captioned cases, listed in the chronological order of these decisions, are:

1. State of North Carolina v. Henry N. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974).
2. State of North Carolina v. Tommy Noell, 284 N.C. 670, 202 S.E. 2d 750 (1974).

3. State of North Carolina v. Alton James Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974).

4. State of North Carolina v. Albert Crowder, Jr., 285 N.C. 42, 203 S.E. 2d 38 (1974).

5. State of North Carolina v. David Earl Dillard, 285 N.C. 72, 203 S.E. 2d 6 (1974).

6. State of North Carolina v. Jesse Thurman Fowler, 285 N.C. 90, 203 S.E. 2d 803 (1974).

7. State of North Carolina v. Billy Honeycutt, 285 N.C. 174, 203 S.E. 2d 844 (1974).

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257 (3), by alleging a deprivation of rights that they contend are secured by the Constitution of the United States of America.

QUESTIONS PRESENTED

I. Is capital punishment, ipso facto, cruel and unusual punishment within the meaning of the eighth amendment to the Constitution of the United States of America? (Petitioners' Question No. 1, in each of the captioned petitions, except Henderson. Petitioner Henderson's Question Nos. 6-10).

II. Were the petitioners' Constitutional rights to procedural due process observed by North Carolina at the pre-trial, trial and appellate stages of the proceedings?

A. At the Pre-trial Stage.

1. Were the Constitutional rights exemplified in Miranda vs. Arizona, 384 U.S. 436 (1966), observed by North Carolina in admitting into evidence extra-judicial statements? (Petitioner Jarrette's Question No. 4).

2. Is Constitutional due process violated where police do not investigate, ad infinitum, every possible shred of evidence thought by a defendant to have some relationship to the crime with which he is charged? (Petitioner Noell's Question No. 4; Petitioner Henderson's Question No. 14).

3. Does the concept of Constitutional due process prohibit police use of a "show up" identification procedure during the investigative stage of the case? (Petitioner Henderson's Question Nos. 1 and 3).

4. Does Constitutional due process in a mandatory death penalty case require the State to seat a juror who has testified on voir dire that because of his personal beliefs he would not return a verdict of guilty, even if satisfied from the evidence beyond a reasonable doubt as to the defendant's guilt? (Petitioner Noell's Question No. 2; Petitioner Jarrette's Question No. 2).

5. Does Constitutional due process require the State to furnish a transcript of the voir dire examination of the jury to the defendant even though he has not requested such a transcript? (Petitioner Honeycutt's Question No. 2).

6. Does Constitutional due process require that a jury include black members where the defendant is a black, even though there is no systematic exclusion of blacks from jury service? (Petitioner Noell's Question No. 5).

7. Does Constitutional due process require a change of venue for the trial of a criminal case merely upon the showing of wide publication of the crime involved? (Petitioner Jarrette's Question No. 4).

B. At the Trial Stage.

1. Does the Constitutional concept of due process require the exclusion of evidence of an independent in-court identification of the defendant as the perpetrator of the crire by the rape victim simply because the victim had previously identified the defendant as the perpetrator in a "show-up" during the investigation of the crime by the law officers? (Petitioner Henderson's Question Nos. 2, 4 and 5).

2. Does the Constitutional concept of due process require a mistrial where a witness spontaneously and voluntarily gives evidence of a non-inflammatory nature and the trial judge immediately orders the testimony stricken and instructs the jury to disregard the spontaneous utterance of the witness? (Petitioner Noell's Question No. 4; Petitioner Crowder's Question No. 2).

3. Does Constitutional due process require the trial judge to instruct the jury that if the jury convicts the defendant of rape, the punishment shall be death, where neither the judge nor the jury has any discretion as to punishment upon conviction of a capital crime? (Petitioner Henderson's Question Nos. 11 and 12).

4. Does Constitutional due process require that the State permit defense counsel to argue the propriety of the death penalty to the jury when neither the judge nor the jury has any discretion as to punishment upon conviction of a capital crime? (Petitioner Dillard's Question No. 2).

5. Does Constitutional due process require the trial judge to instruct the jury as to lesser included offenses when the charge laid in the indictment and all of the State's evidence introduced at trial tend to prove that only the capital offense, if any, was committed? (Petitioner Henderson's Question No. 13).

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C. At the Appellate Stage.

1. Does the concept of Constitutional due process require that the State assure the burden of proving the negative of any issue raised by a defendant on appeal in a capital case? (Petitioner Henderson's Question No. 10).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Constitutional Provisions

A. These cases involve the eighth, tenth and fourteenth amendments to the Constitution of the United States of America which provide, inter alia:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (U.S. Const. amend. VIII).

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people. (U.S. Const. amend. X).

> . . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV, §1.).

B. Additionally they involve the Constitution of North Carolina, Article XI, which provides:

> §2. Death punishment. The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact.

II. Statutory Provisions.

These cases also involve the following provisions of the General Statutes of North Carolina as construed by the North Carolina Supreme Court in State v. Waddell, 282 N. C. 431, 194 S. E. 2d 19 (1973) applying this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972):

A. N. C. General Statute § 4-1. Common Law declared to be in force.

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

B. N. C. General Statute § 14-17. Murder in the first and second degree defined; punishment.-

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.* All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

C. N. C. General Statute § 14-21. Punishment for rape.

> Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the Court shall so instruct the jury.*

D. N. C. General Statute § 15-187. Death by administration of lethal gas.

> Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

E. N. C. General Statute § 15-188. Manner and place of execution.

> The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead. . . .

* Subsequent to this Court's decision in Furman, the North Carolina Supreme Court in State v. Waddell 282 N. C. 431, 194 S.E. 2d 19 (1973) declared the portions set forth in italics above unconstitutional.

STATEMENT OF THE CASES

Considering that petitioners are each in extremis, the hyperbolic and vituperative content of their petitions is understandable even though unsupported by the evidence of record, the facts found arising from that evidence, or the law itself as applied in North Carolina. Thus respondent will bypass the invective and respond only to the merits of the questions raised.

However, respondent notes the petitions are replete with references to other States' statutes and their interpretations by the highest courts of those States. As North Carolina spends full time enforcing its laws in a positive manner, it deems it unnecessary to respond to other States' actions as portrayed to this Court by petitioners. After all, it is North Carolina's laws which petitioners violated and it is North Carolina which will enforce those laws which are ultimately held to be in accordance with the Constitution of the United States by this Court.

* Subsequent to this Court's decision in Furman, the North Carolina Supreme Court in State v. Waddell, 282 N. C. 431, 194 S.E. 2d 19 (1973) declared the portions set forth in italics above unconstitutional.

1. The Jarrette case. No. 73-6877
[284 N.C. 625, 202 S. E. 2d 721(1974)].

Henry Jarrette, a black man, was an escaped murderer. Within 48 hours of his escape he raped, by force and violence, Gwendolyn Blackmon, an unarmed and helpless sixteen year old black girl. Shortly thereafter he murdered David Parker, an unarmed and helpless sixteen year old white boy by plunging a knife into his chest. Jarrette was sentenced to death for each of the foregoing crimes.

Before escaping, Jarrette was in prison serving life sentences for two different murders. Through a program inspired by humanitarian values and based upon the concept that a convicted felon might, given a reasonable opportunity, be rehabilitated; the N.C. Department of Corrections and the N. C. Junior Chamber of Commerce developed a turnkey program whereby Jaycee units were established within the prison system of North Carolina. Such a Jaycee unit was established in the custodial institution to which Jarrette was assigned.

Jarrette rose to the office of president of his local Jaycee unit and was nominated for an award for his work there. He was escorted by a prison guard to the State's capital to receive an award. Notwithstanding that he would be eligible for parole after serving 10 years of his life sentence for murder,* Jarrette escaped.

Within 48 hours, Jarrette had kidnapped and raped Gwendolyn Blackmon. He rode around in her car, holding her hostage until he could find another car. He told her she was lucky she was black, for if she were white he would kill her.

Jarrette then observed a car parked at a laundromat occupied by a single occupant, sixteen year old David Parker. Jarrette approached Parker's car and said something to Parker while standing at the driver's open window. Jarrette reached into the open window and stabbed Parker to death.

* §148-58. Time of eligibility of prisoners to have cases considered. - All prisoners shall be eligible to have their cases considered for parole . . . any prisoner serving sentence for life shall be eligible for such consideration when he has served 10 years of his sentence.

Jarrette fled the state and was captured by agents of the FBI in Tennessee. They warned him of all his rights guaranteed to him by the Constitution of the United States. Jarrette confessed. He was returned to North Carolina, furnished astute counsel at every stage of the judicial proceedings, charged and tried by a fair and impartial jury.

Jarrette was convicted and sentenced to die in the gas chamber at the State's prison in Raleigh by administration of lethal gas.

Appeal to the Supreme Court of North Carolina of any sentence of death is mandatory by the law of North Carolina. Appeal was had and the conviction affirmed.

2. The Noell case. No. 73-6876
[284 N. C. 670, 202 S. E. 2d 750 (1974)].

Tommy Noell is a black male who by force and violence raped Linda DiCenzo, a young white female practical nurse.

Noell gained entry into Miss DiCenzo's apartment by trick in the late morning hours, having followed her home around 8:30 a. m. after she had gotten off work at N. C. Memorial Hospital in Chapel Hill, N. C.

Noell bruttally beat Miss DiCenzo and choked her until she submitted. The degree of violence to her body was fully described by the testimony of impartial witnesses.

Noell was fully identified by his victim as the perpetrator of the crime which occurred during full daylight hours. There was other corroborative evidence of his presence at the scene of the crime at the time it occurred.

Noell never confessed to the crime. His defense was an alibi, which was never established. After receiving all of the procedural safeguards guaranteed to him by both North Carolina and Federal Constitutions and Acts of the North Carolina General Assembly, Noell was convicted and sentenced to die. His conviction was affirmed upon appeal.

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3. The Henderson case. No. 73-6853
[285 N. C. 1, 203 S.E. 2d 10 (1974)]

Alton James Henderson is a white male who by force and violence raped Judith Strader, a white woman. Henderson entered Miss Strader's home in the late evening while she was asleep.

Henderson was able to consummate the rape only after Miss Strader had torn her fingernails from her hands in resistance, and he had severely beaten her and choked her until she thought everything was going to pop out of her head.

After the rape, she talked to Henderson for more than thirty minutes and could see his face clearly from a utility company light outside her bedroom window. There was other corroborating identification of Henderson as the perpetrator of the rape.

Henderson never confessed, but like Jarrette, Henderson fully received the benefits of all Constitutionally guaranteed safeguards as established by both the North Carolina and United States Constitutions, as well as those procedural safeguards established by the Acts of the N. C. General Assembly and the decisions of the North Carolina Supreme Court.

He had astute counsel. Upon being convicted, he was sentenced to die. Upon appeal to the Supreme Court of North Carolina no prejudicial error was found to have occurred in his trial. His conviction and sentence were therefore affirmed.

4. The Crowder case. No. 73-6878
[285 N. C. 42, 203 S. E. 2d 38 (1974)]

Albert Crowder, Jr., a black man, shot and killed Peggy Bryant, a black woman, with a .38 caliber pistol.

Crowder called Miss Bryant, his former girlfriend, out of a lounge. He told her he had something for her birthday, whereupon he shot her in the head, killing her.

He was convicted of first degree murder and sentenced to die. On appeal no prejudicial error was found to have occurred in his trial.

5. The Dillard Case. No. 73-6875
[285 N. C. 72, 203 S. E. 2d 6 (1974)]

David Earl Dillard, a black man, shot and killed his wife, Mattie Dillard, a black woman, with a shotgun in a church while she was attending church services on an Easter Sunday morning.

Dillard's counsel emphasizes that Dillard made no threatening gestures or expressed hostility to the armed arresting officers subsequent to the killing. Perhaps they seek to demonstrate his kindly and worthwhile character after he had completed his mission of cold blooded murder.

Dillard too, as was his right, received at each step of the proceedings against him the best defense and most impartial administration of justice man has been able to devise.

He too was convicted by a jury of his peers and was sentenced to die in the gas chamber, and this sentence was affirmed.

6. The Fowler Case. No. 73-7031
[285 N. C. 90, 203 S. E. 2d 803 (1974)]

Jesse Fowler, a black man, had an argument and fist fight with John Griffin over a ten dollar bill. Fowler, after a sufficient cooling off period went to his home. Fowler took a .38 pistol and shot Griffin to death. A few hours later, at the urging of his wife and a friend, Fowler went to the police to explain what happened. He was advised of his rights, and waived them, indicating his desire to make a statement without the presence of counsel. Fowler was duly tried, convicted and sentenced to death. On appeal, no prejudicial error was found by the N. C. Supreme Court and the judgment was affirmed.

7. The Honeycutt Case. No. 73-7032
[285 N. C. 174, 203 S. E. 2d 844 (1974)]

Just prior to June 6, 1973, Billy Honeycutt, a white man, his wife Brenda, a white woman, and their nine year old daughter Billie Jean lived together in a trailer. At least three times prior to the date on which Billy killed his wife, he told friends

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and acquaintances that he was going to kill her. Then, on June 6, 1973, Billy told his wife, "If I can't have you, then no man can." He then took a butcher knife from his pants and stabbed his wife repeatedly as she tried to flee down the hall. Defendant's daughter, Billie Jean, ran to a neighbor's house to get help for her mother. The Duplin County sheriff's department was called and Deputy Sheriff Proctor responded. He testified that when he arrived he found the body of Brenda in the trailer. He found Honeycutt on the premises and advised him of his Constitutional rights. Upon being told that she was dead Honeycutt said, "Ha, I'm damn glad of it."

ARGUMENT

I. The Decisions Below are Clearly Correct.

A. CAPITAL PUNISHMENT, IPSO FACTO, IS NOT CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The proscription of cruel and unusual punishment is applicable to the States through the due process clause of the fourteenth amendment. Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962). The North Carolina Supreme Court so held in State v. Waddell, 282 N.C. 431, at page 436, 194 S.E. 2d 19, 23 (1973).

Since the beginning of the United States as a separate nation two hundred years ago, death sentences have been administered by both the federal and state governments for a variety of crimes. As the North Carolina Supreme Court noted in Waddell, id. at page 435:

> Prior to the decision in Furman v. Georgia the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed. 345 (1879); In re Kemmler, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); Weems v. United States, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); Trop v. Dulles, 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958); Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); McGautha v. California, 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to Furman casts the slightest doubt on the constitutionality of capital punishment.

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Nor is there reason to believe this Court now considers capital punishment to be cruel and unusual punishment, per se, within the meaning of the eighth amendment. In Furman v. Georgia, 408 U.S. 238 (1972), the Justices of this Court went to some length to explain that they did not reach that question.

As the North Carolina Supreme Court noted in the Waddell case:

> Mr. Justice Douglas. . .wrote. . .Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach . . .(282 N.C. at 437).
>
> Mr. Justice Stewart. . .expressed his views as follows. . .The constitutionality of capital punishment in the abstract is not . . .before us in [Furman]. . .(282 N.C. at p. 437-438).
>
> Mr. Justice White. . .depicts his views. [thusly]. . .'I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment. . .'(282 N.C. at 438).
>
> Four members of the [U.S. Supreme] court dissented [in Furman]. The position of the four dissenters is best summed up by Chief Justice Burger as follows:. . . . Today the Court has not ruled that capital punishment is per se violative of the Eighth Amendment; nor has it ruled that punishment is barred for any particular class of classes or crimes. . .(282 N.C. at 439).

Thus, our court having to apply this Court's Furman decision in Waddell, at 282 N.C. 439, held:

> The foregoing quotations from the various separate opinions in Furman compel the conclusion that capital punishment has not been declared unconstitutional per se. Rather, the Furman decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion.

The Waddell case was tried prior to the Furman decision, and Waddell was sentenced to death. It was the first case to reach the N. C. Supreme Court subsequent to Furman. The N. C. Supreme Court then applied this court's Furman decision to Waddell and ordered his death sentence vacated and that he be sentenced to life imprisonment, 282 N. C. at 447.

The N. C. Supreme Court further declared unconstitutional the following provisions of N. C. Gen. Stat. §§ 14-17 (murder), 14-21 (rape); 14-52 (burglary); and 14-58 (arson):

> Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.

For the reasons set forth in its opinion, our court demonstrated that the proviso clause was clearly severable from the clause setting forth the punishment as established by the General Assembly. See Waddell, 282 N. C. at pages 441-445.

The Waddell decision thus left death as the only permissible punishment in North Carolina for the crimes of first degree murder, rape, burglary and arson. The North Carolina Constitution of 1970 specifically provided for such punishment.

Our court in Waddell went even further to protect the Constitutional rights of its citizens against ex post facto laws, for at 282 N. C. at page 446, it held:

> North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date. (Emphasis added).

Thus, it can be seen that petitioners' averments that the North Carolina Supreme Court has attempted to evade the Furman decision by "tortured" reasoning and "similar manipulations" designed "to emasculate a constitutional decision of the [U. S. Supreme] Court" constitute journalistic jargon more common to editorial excesses than reasoned and responsible arguments in a court of law.

B. THE NORTH CAROLINA GENERAL ASSEMBLY HAS CONSISTENTLY DECREED THE DEATH PENALTY FOR FIRST DEGREE MURDER AND RAPE FOR NEARLY TWO HUNDRED YEARS; IN 1974 IT REAFFIRMED THAT POLICY.

In 1778, the State of North Carolina enacted what is now codified as G. S. 4-1 which states:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the Common Law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.

As both murder and rape were capital felonies under the common law, they became so in North Carolina in 1778. Thus death has been the punishment for murder in the first degree and rape in North Carolina for nearly two hundred years. Waddell, supra at p. 441.

It was in 1949 that our present statutes providing for punishment in capital cases were amended. Prior to that time the punishment was death.

The amendments to each of our capital punishment statutes added the proviso which (1) empowered the jury in its discretion to recommend and thus to fix the punishment at life imprisonment, and (2) required the trial judge to so instruct the jury. Waddell, supra.at 441.

The legislative history of the subject is succinctly set forth in the Waddell decision at pages 441 and 442, as follows:

> Since the 1949 amendment adding the proviso, seventeen bills or resolutions have been introduced in the General Assembly of North Carolina designed to abolish or limit the imposition of the death penalty for rape or other capital offenses. See House Bills 924, 925, 927 and 928 in the 1955 Session; House Bill 113 in the 1961 Session; House Bill 35, Senate Bill 27 and Senate Resolution 173 in the 1963 Session; House Bills 103 and 351 in the 1965 Session; House Bills 68, 71, 138 and 314 in the 1967 Session; House Bill 160 in the 1969 Session; and House Bill 397 and Senate Bill 251 in the 1971 Session. All of these bills and resolutions failed to receive a favorable report from the committee to which referred, or were tabled or defeated on the floor of the House in which introduced.

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The new State Constitution, which was ratified by the people in the general election of 1970, retained the provision contained in the former Constitution of North Carolina authorizing the General Assembly to provide by statute for the imposition of the death penalty for murder, arson, burglary and rape. See Constitution of North Carolina, Article XI, Section 2. Thus, there is nothing in the legislative or constitutional history of this State to indicate an intent by the Legislature, or by the people, to reduce the punishment for rape from death to life imprisonment, or to indicate that the 1949 proviso was enacted for that purpose except upon the discretionary recommendation of the jury, or to indicate that such proviso would have been enacted at all had its unconstitutionality been foreseen by the 1949 General Assembly. Rather, such history demonstrates a constant intent by the people and their representatives to retain the death penalty for murder, arson, burglary and rape notwithstanding the proviso added in 1949.

It is the proviso, and the proviso alone, which creates the discretionary difficulty condemned by the Furman decision; and it is quite clear that Furman strikes down the proviso as violative of the Eighth and Fourteenth Amendments.

The question which the North Carolina Supreme Court was confronted with was:

> Does the remainder of G. S. 14-21 stand alone with death as the mandatory punishment for rape; or , is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?

It was the sole duty and responsibility of our Supreme Court to answer that question. Justice Lake, speaking in a concurring opinion in Waddell, summed up that duty as concisely as can be done at 282 N. C. 448 and 449. He said:

> The Supreme Court of the United States being the higher authority on the validity of judgments under the Constitution of the United States, its mandates, issued in reliance upon Furman v. Georgia, 408 U. S. 238, 92 S.Ct. 2726 , 33 L.Ed. 2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Huskins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded these cases to the respective superior courts for the imposition of sentences of life imprisonment.
>
> The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in Furman v. Georgia, supra, and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.

Only this Court can determine whether any portion of G. S. 14-21 is the law of North Carolina today and, if so, which portion. The Legislature , now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's prerogative and responsibility. It is for us, and for us alone, to determine what part of G. S. 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpretation of the statute - an exercise of the judicial function which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. I, § 6; Art. IV, §1.

It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape, hereafter committed. Constitution of North Carolina, Art. I, § 6; Art. II, § 1; Art XI, § 2. But the Legislature has spoken in G. S. 14-21 and, until it speaks again, it is the duty of this Court to determine what, if anything, remains of its pronouncement in G. S. 14-21 after the decision in Furman v. Georgia, supra. No officer or agency, save this Court, can make that determination.

> ...Whether a statute is separable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.
>
> Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. 14-21 is or is not separable. What it has said in Furman v. Georgia, supra, is that the discretion which the proviso in G.S. 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court -- today -- not the date of the decision in Furman v. Georgia, supra, which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the ex post facto principle.

The Supreme Court of North Carolina answered the question it was confronted with in Waddell as follows:

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The original portion of G.S. 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the constitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion. (282 N. C. at 442-443).

• • • •

In light of the authorities cited, we hold that the unconstitutional proviso in G.S. 14-21 is severable and the remainder of the statute with death as the mandatory punishment for rape remains in full force and effect. (282 N. C. at 444-445).

• • • •

We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in Furman, the Legislature may wish to delete the unconstitutional proviso from G.S. 14-21 (rape), G.S. 14-17 (murder), G.S. 14-52 (burglary), and G.S. 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the Furman decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge. (282 N. C. at 445).

In the application of its decision in Waddell, the North Carolina Supreme Court directed that the death penalty could not be imposed on any criminal, whether tried or not, for any capital offense committed at or before the time of the finding of its decision on January 13, 1973. (282 N. C. at 446). Compare Johnson v. New Jersey, 384 U.S. 719 (1966).

Thus it is seen that except for the citations, petitioners' characterization at pages 23-27 of their petition (Dillard) hardly resembles what actually occurred in the State of North Carolina.

In 1974, the General Assembly did abolish the death penalty for the crimes of burglary and arson. It mandated death for first degree murder or rape.

Each of the petitioners' petitions involve only the crimes of first degree murder or rape.

Jarrette was the first case to reach the Supreme Court for a crime committed subsequent to the Waddell decision.

In the Jarrette case, 284 N. C. 625, 202 S.E. 2d 721 (1974), the North Carolina Supreme Court was requested to reconsider its decision in Waddell. The court did and reaffirmed its decision, id. at page 654.

The Court noted in Jarrette at pages 654-655:

> The determination of what the statutes of this State mean, with reference to the punishment to be imposed for criminal offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. Adderly v. Florida, 385 U. S. 39. . .reh.den., 385 U. S. 1020; Shuttlesworth v. Birmingham, 382 U. S. 87. . . .
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> • • • •
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> The contention of [Jarrette] is that a state statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.
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> This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must do so in the light of decisions heretofore rendered by that Court.

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C. THE MERE EXISTENCE OF PROSECUTORIAL DISCRETION, PLEA BARGAINING, AND EXECUTIVE CLEMENCY DO NOT BRING A MANDATORY DEATH PENALTY STATUTE WITHIN THE PROHIBITIONS OF THE FURMAN DECISION.

These questions were raised by petitioners in the North Carolina Supreme Court. As our court noted in the Jarrette case, 284 N. C. at 656:

> Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the seriousness with which they are advanced impels us to take note of them briefly.

The court then addressed itself to each of the contentions of Jarrette and its answers are set forth at 284 N. C. 656-666. These are found in Petitioner Jarrette's petition (No. 73-6877), Appendix "A", 202 S.E. 2d 721 at pages 741-747.

The respondent, State of North Carolina, is unable, after research, to improve upon the reasoning and line of authorities set forth in the Jarrette opinion as noted immediately above. Accordingly, respondent adopts that reasoning and line of authorities as its response in this Court to the petitioners' contentions which are set forth in the Dillard Petition (No. 73-6875) at pages 28-51.

D. CONTEMPORARY STANDARDS OF ONE OR MORE STATES OR THE FEDERAL GOVERNMENT CANNOT BE THE BASIS FOR ABROGATING RIGHTS OF OTHER STATES RESERVED TO THEM BY THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court only recently had to resort to first principles of Constitutional government as established in the United States of America, United States v. Richard M. Nixon, _____ U.S. _____, 41 L.Ed 2d 1039 (1974):

> Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." Powell v. McCormack, supra, 549, 23 L Ed 2d 491. And in Baker v. Carr, 369 U.S. at 211, 7L Ed 2d 663, the Court stated: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

• • • •

> Notwithstanding the deference each branch must accord the others, the "judicial power of the United States" vested in the federal courts by Art III, § 1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The Federalist, No. 47, p. 313.

• • • •

> In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 96 L Ed 1153, 72 S Ct 863, 25 ALR2d 1378 (1952) (Jackson, J., concurring).

This Court noted that unreasonable Constitutional claims can "upset the constitutional balance of a workable government". (41 L.Ed.2d at 1063).

Of course, the Court in Nixon was addressing itself to allocating the sovereign power between the three branches of the federal government.

Under the regime of Constitutional law as established in the United States, the separation of powers and checks and balances as a means to maintain liberty went further than separating only the three branches of the federal government. The constitutional scheme places heavy reliance upon the independence and sovereignty of the States. A. T. Mason, Free Government in the Making, 3rd Ed. Oxford University Press (1965) at pages 140 and 141 observed:

> John Adams [was] certainly among the best-informed men in the country on political science...

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> Toward the end of his life Adams could take satisfaction in noting that the federal system followed his basic principle to an extraordinary degree, including, as he saw it, no less than eight balances: (1) states and territories against the central government; (2) the House of Representatives against the Senate; (3) the President against Congress; (4) the Judiciary against Congress; (5) the Senate against the President in matters of appointments and treaties; (6) the people against their Representatives; (7) the state legislatures against the Senate; (8) the Electoral College against the people.

Scott, Sovereign States and Suits, (1925) at pages 55-57 observes:

> Without laboring the matter further, it is abundantly clear that the States after the Declaration of 1776 were free, sovereign and independent, and they remained so, in the sense of international law, until they changed that status by their subsequent, and, as we shall see, voluntary act.

When the States changed their status with respect to the new government of the United States they did not surrender their sovereignty or become mere "quasi-sovereigns". The States granted certain of their powers to the United States of America,and as Hamilton stated in The Federalist (No. 45), "The Powers delegated by the proposed Constitution to the federal government are few and defined."

The proposition that the federal government is one of limited powers is so fundamental and so apparent that it needs little elaboration. As stated by Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. 316 (1819):

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends . . . found it necessary to urge. That principle is now universally admitted. . . . We admit, as all must admit, that the powers of the [federal] government are limited, and that its limits are not to be transcended.

Justice Story, in Hunter v. Martin's Lessee, 14 U.S. 303, 325 (1816), said:

> The government, then of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.

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There, then can be no dispute that the federal government has no powers beyond those delegated to it in the Constitution. That is, it has only limited sovereignty.

This being so, then where does the remainder of the sovereign power lie? If the answer be "the people" then who has "the people" deemed should exercise the remaining powers of their sovereignty?

The State contends the answer is to be found in the tenth amendment to the Constitution.

It is the State's contention that two of the incidents of those sovereign powers reserved to the States is the power to define criminal conduct and provide for the punishment therefor within the State's territory, limited only by the prohibition against cruel and unusual punishment contained in the eighth amendment.

Roscoe Pound in Volume II, Jurisprudence, part 12, Law and the State, at page 317 states:

> As a legal conception, sovereignty seems to mean the aggregate of powers possessed by the ruler or the ruling organs of a politically organized society. Internal sovereignty, then, is the aggregate of the powers of internal control possessed by the ruling organs of the society by virtue of which it is paramount over all action within. According to Sir Frederick Pollock it is the capacity "of making, declaring and amending the law . . .without reference to any other authority and without any legal limit to its own power."
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> But the idea of sovereignty begins with Bodin. He defined the state (republica) as an association governed by the highest power (suprema majestas) as the "highest power over citizens and subjects, free from laws" (legibus soluta). Its chief characteristic was the power to give law to all citizens.
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> At common law, social interests were largely secured by a doctrine that the king was parens patriae, father of his country. That is, he was the guardian of public and social interests of all kinds and hence his courts of law and of equity had a general superintendence of all matters where "public rights" (i.e. social interests or public interests) might be jeopardized.
>
> Criminal law is the primary resource of the legal order for securing social interests immediately as such. At common law, prosecutions were in the name of the king and under the control of the Attorney General to the extent of his authority to enter nolle prosequi. . .(Pound. III Jurisprudence, Part 14, Scope, Subject Matter of Law, at p. 264).

Pound further discusses Interests in part 14 of Volume III, Jurisprudence at page 238, et. seq. He specifically discusses the interests of the state as a legal entity.

1. Interests of the state as a juristic person.

> No small part of international law is taken up with the interests of states which international law should secure against infringement by other states. Thus it has usually been said that the absolute or natural rights of states, meaning the interests which it is held should be secured, are: (1) The right of self-preservation and independence. This is analogous to the so-called natural rights of physical integrity and personal liberty ascribed to the individual. It is analogous to an individual interest of personality. [and] (2) The right of exclusive legislation and jurisdiction within its territory. This, too, is an interest of personality. It is an interest akin to the interest of the individual in being allowed to manage his own affairs freely. Juristically, it is secured as a liberty....

As the tenth amendment is directed toward maintaining the class of interests referred to by Pound as "public interests", id. (Vol. III at page 235), the United States of America is equally obligated to protect the State of North Carolina's exercise of its sovereign rights as it is to protect any other Constitutionally protected right whether it be individual or State.

This Court, even if it desired to do so, can no more lawfully abrogate a Constitutionally guaranteed right of a State than it can a right of an individual. Thus "contemporary standards" of "society" cannot be a proper basis for abolishing the death penalty under the eighth amendment any more than the "contemporary standards" of the McCarthy era could abolish the rights guaranteed to the individual under the fifth amendment to the Constitution.

Only by the exercise of the sovereign power of the State through its legislature may the punishment for murder or rape be lessened in North Carolina.

No other body of men and women on the face of this earth is lawfully entitled to exercise that governmental power other than the people of North Carolina, either directly in revolution or by vote on a new constitution.

II. NO CONFLICT OF DECISIONS BETWEEN THE NORTH CAROLINA COURT AND THIS COURT IS PRESENTED BECAUSE PETITIONERS' CONSTITUTIONAL RIGHTS TO PROCEDURAL DUE PROCESS WERE FULLY OBSERVED BY NORTH CAROLINA AT EACH STAGE -- PRETRIAL, TRIAL AND APPELLATE -- OF THE PROCEEDINGS.

In responding to the contentions of the petitioners alleging a denial of constitutionally guaranteed procedural rights, North Carolina notes that our Supreme Court addressed itself to most of the questions presented here.

Our Court unanimously held in each instance that what actually happened at the pretrial and trial proceedings was in full compliance with the decisions of this Court aimed at obtaining procedural due process.

Accordingly, North Carolina submits there is no conflict between the decisions of our Supreme Court and the decisions of this Court and, therefore, petitioner's petitions for writs of certiorari as to those questions should be denied.

Perusal of the North Carolina Supreme Court's opinions which are attached to the petitions as appendices "A" will reveal the accuracy of North Carolina's contention here.

However to assist this Court in understanding the questions raised by petitioners, we have attempted to phrase them properly so as to clearly present the question petitioners seek to have this Court review. Respondent has grouped them according to the stage of the proceedings below at which the question was raised.

A. At the Pre-trial Stage

1. The petitioner Jarrette's Constitutional rights exemplified in Miranda v. Arizona, 384 U.S. 436 (1966) were observed by law officers interrogating Jarrette after his arrest. (Petitioner Jarrette's Question No. 8).

Jarrette contends that his confession given to Sheriff Frank Fowler of Union County, after his return to North Carolina, was made without his fully understanding his rights as set out in this Court's decision in Miranda, supra.

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The evidence demonstrates that Jarrette, an escapee from prison, was intimately familiar with the criminal processes. He is a high school graduate and he had risen to the office of president of a chapter of the Jaycees. The FBI agents who arrested him in Memphis had fully advised him of his rights at least three times there, and he had given them two signed confessions which are materially similar to the confession he made to Sheriff Fowler, and to the introduction of which he now objects. After fully advising him of his rights, Sheriff Fowler transcribed the statement which Jarrette made. Jarrette refused to sign it, saying that he knew that a lawyer would be appointed for him at trial. He did not ask for a lawyer during questioning, signed a waiver of his rights, and told the Sheriff that he would probably sign the statement later. There is no contention that the statements are inaccurate or that the confession objected to was made from fear or hope of reward.

In Miranda, this Court recognized the policy of the law of long standing in North Carolina that extra-judicial confessions made to law officers, if they are to be used as evidence at trial, must be freely and voluntarily made; and not made as a result of fear of consequences or hope of leniency or reward induced by law officers. Miranda held that the officers must advise the suspect of his rights, and only when he knowingly and intelligently waives those rights may extra-judicial confessions be used as evidence in his trial.

Thus, when defendant objects to the introduction of the confession, a question of fact is presented to be resolved. The burden of proof is on the State to prove each fact necessary to lay a proper foundation for the admissibility of the confession. This is done on voir dire and evidence is taken to prove the facts necessary for the foundation to be laid. The voir dire is adversary and evidence is adduced by both sides. The trier of fact answers the question of fact thus presented.

The question on appeal is not whether the appellate court would have resolved the issue presented by the evidence in the

same manner in which the trial court resolved it, but whether the findings of ultimate fact are supported by substantial competent evidence.

This was done in Jarrette's case and the entire proceeding was carried out with meticulous care.

Accordingly, North Carolina submits petitioner Jarrette's Question No. 4 contained in his petition should not be reviewed.

2. Constitutional due process is not violated where police do not investigate, ad infinitum, every possible shred of evidence thought by a defendant to have some relationship to the crime with which he is charged. (Petitioner Noell's Question No. 4; Petitioner Henderson's Question No. 14).

Both Noell and Henderson contend that Constitutional due process requires law officers assigned to a particular case to affirmatively investigate to its ultimate end, every possible bit and piece of evidence which comes to the officer's attention during the course of the investigation.

In both the Noell and Henderson cases, the law officers were faced with independent and credible evidence to establish the crime in question had been committed. They were also faced with direct positive eyewitness identification evidence, plus independent corroborative evidence, that Noell and Henderson were the ones who perpetrated the crimes established.

Our court noted in the Noell case, 284 N. C. 670 at page 694:

> Police officers are under no duty to take any particular course of action when investigating a crime. Of course, they cannot suppress evidence, Brady v. Maryland, 373 U.S. 83 111 (1963). They are not required, however, to follow all investigative leads and to secure every possible bit of evidence. And their failure to do so is not prejudicial error [citing] People v. Baber, 31 Mich. App. 106, 187 N.W. 2d 508 (1971).

In People v. Baber, supra. the Michigan Court held failure to follow all investigative leads did not give rise to a valid claim of a denial of Constitutional due process. In accord are State v. Kelly, 110 Ariz. 196, 516 P.2d 569 (1973) and People v. Allen, 351 Mich. 535 (1958).

The cases on which petitioners rely are particularly inapposite to the facts in these cases. Brady v. Maryland, 373 U.S. 83 (1963); Giles v. Maryland, 386 U.S. 66 (1967); and Wardius v. Oregon, 412 U.S. 470 (1973) have nothing to do with the duty of police officers to pursue every imaginable investigative effort, but rather they are concerned with whether the police and prosecution must make available to the defendant discovered exculpatory evidence. Although the interests of the State are best served when justice is done, the defendant has no right to demand that the police pursue every investigative lead in a given case. A criminal accused has a right to trial by a jury and the courts, not by the police. There is no way to know what the evidence belatedly requested in these cases would have shown. The police considered that any evidence to be discovered by these means would be repetitive, cumulative identification testimony, and they were not arbitrary or capricious in that belief. There is nothing in the record to show that counsel requested the accumulation of this scientific evidence; or proof that the defendants moved to suppress references to the discovery of the hair and blood stains at the trial.

The State contends the decisions of our Supreme Court in these two cases were proper, and therefore petitioner Noell's question No. 4 and petitioner Henderson's question No. 14 should be denied further review by this Court.

3. The concept of Constitutional due process does not prohibit police use of a "show up" identification procedure during the investigative stage of the case. (Petitioner Henderson's Question Nos. 1 and 3).

As this Court held recently in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972), due process of law does not preclude the police from using a show up in order to obtain an identification of a criminal suspect; nor does the suspect need to have counsel present when the show up takes place before the commencement of adversary proceedings.

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Petitioner Henderson, (No. 73-6853) objects to the use of the show up identification procedure during the investigative stage of the case and before the commencement of adversary proceedings.

At the trial of the Henderson case, the State offered no evidence respecting the out-of-court identification. The State did offer an in-court identification, and prior to admitting the in-court identification the trial court held a complete voir dire hearing in order to determine whether the in-court identification had an origin adequately independent of the out-of-court identification. In its opinion, the North Carolina Supreme Court held that it was unnecessary for them to reach the question whether the out-of-court identification procedure used in this case was Constitutionally impermissible because the trial court had held upon competent evidence that the in-court identification had an origin separate from the out-of-court identification. Nevertheless, the North Carolina Supreme Court very carefully considered the contention of petitioner that the use of a show up identification rather than a lineup identification was impermissible, 285 N.C. at 9-12. Our court cited the case of Kirby v. Illinois, 406 U.S. 682 (1972), for the proposition that the right to counsel at pre-trial identification procedures attaches only "at or after the time that adversary judicial proceedings have been initiated against [the defendant.]" The court said whether a show up identification violates due process depends on the totality of the circumstances. The court then held that the evidence in this case relative to the confrontation, particularly the fact that the confrontation took place a very short time after the crime was committed, led to the result that the out-of-court procedure used here in the investigative stages of the case was not improperly suggestive.

Because no evidence of the out-of-court identification was submitted at the trial, and because the trial court found upon competent evidence, as is to be discussed infra., that the in-court identification could be separated from the out-of-court identification, the objections of the petitioner to the use of the showup present no question for review by the Supreme Court.

Accordingly, the State contends that petitioner Henderson's questions Nos. 1 and 3 should be denied further review by this Court.

4. Constitutional due process in a mandatory death penalty case does not require the State to seat a juror who has testified that because of his personal beliefs he would not return a verdict of guilty, even if satisfied from the evidence beyond a reasonable doubt as to the defendant's guilt. (Petitioner Noell's Question No. 2; Jarrette's Question No. 2).

Petitioner Noell (No. 73-6876, Question No. 2) and Petitioner Jarrette (No. 73-6877, Question No. 2) contend that the examination of the veniremen in each of those cases with respect to their expressed attitudes towards returning a verdict which involved the death penalty led to improper exclusion of jurors.

The case of Witherspoon v. Illinois, 391 U.S. 510, 83 S.Ct. 1770, 20 L.Ed. 2d 776 (1968) establishes two things: (1) Veniremen may not be challenged for cause simply because they voice general objection to the death penalty or express conscientious or religious scruples against its infliction; and (2) verniremen who are unwilling to consider all of the penalities provided by law and who are irrefutably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge during the course of the trial, may be challenged for cause on that ground. In Witherspoon at 510, this Court said:

> The only justification the State has offered for the jury-selection technique employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death the proper penalty. But in Illinois, as in other states, the jury is given broad discretion to decide whether or not death is 'the proper penalty' in a given case, and a juror's general views about capital punishment play an inevitable role in such decision.

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This language from Witherspoon reflects an important ground of the reasoning in that case -- a line of argument that is no longer applicable in North Carolina following the decisions of this Court in Furman v. Georgia, 408 U.S. 238, (1972) and the

Supreme Court of North Carolina in State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973). No longer do North Carolina jurors decide whether death is "the proper penalty," for the law mandates the penalty of death for the enumerated crimes.

While the supportive argument of the petitioners' Noell and Jarrette "that identifiable segments of the community [cannot be systematically excluded from jury panels]" correctly states the law, that proposition is not exactly hand-in-glove with the principle stated by this Court in Witherspoon that even though persons with scruples against the imposition of the death penalty constitute a sizeable group in many communities:

> . . . nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear: (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitudes toward the death penalty would prevent them from making an impartial decision as to the defendant's quilt. (Witherspoon v. Illinois, 391 U.S. 510, fn. 21 at p. 522.

Such veniremen as were excluded in these cases, although they may constitute an identifiable segment of the community, have no place on a trial jury, the sole function of which is to find guilt or innocence. Their views respecting the propriety of the death penalty are a mere irrelevancy where the penalty is set by the law, and the jury has no discretion to set the penalty. All that happened in these cases, is that the court held in each instance that such veniremen could be excluded.

Even an examination of those portions of the voir dire examination quoted in the petitions in these cases discloses that the excluded jurors stated that they were irrevocably committed to vote against a verdict requiring the imposition of the death penalty, without regard to what the evidence might show. The North Carolina court, in each case, observed correctly that these jurors had made up their minds before the trial began. The question is one of the application of settled law to familiar facts, and it is not sufficiently important to require review.

5. Constitutional due process does not require the State to furnish a transcript of the voir dire examination of the jury when defendant has not requested such a transcript. (Petitioner Honeycutt's Question No. 2).

Petitioner Honeycutt (No. 73-7032, Question No. 2) claims that Constitutional due process requires the State to furnish a transcript of the voir dire examination of prospective trial jurors in a capital case even in the absence of a request.

The question is not properly before the Court, because for all that appears in the record,the question is raised for the first time in the petition for certiorari. The question was neither raised in nor passed upon by the Supreme Court of North Carolina, nor does it appear in the record that a request was made to the trial court that a transcript be made and made available to the petitioner.

As this Court said in Williams v. Georgia, 349 U.S. 375, 382 (1954), "A state procedural rule which forbids the raising of a federal question at late stages of the case, or by any other than a prescribed method, has been recognized as a valid exercise of State power." See also, Chambers v. Mississippi, 410 U.S. 284, at 308 et.seq. (1973) (opinion of Rehnquist, J.).

The rule of appellate practice in North Carolina is to the effect that the "Supreme Court will not decide questions which have not been presented or adjudicated in the court below, especially questions relating to the constitutionality of a statute or an act of Congress". 1 Strong's, N.C. Index 2d, p. 106 (1967), and cases there cited.

There is a second reason that this Court should not grant certiorari to question No. 2 raised by the petitioner, Honeycutt, as to the requirement of a transcript of the voir dire examination of jurors. It is not the practice in North Carolina to make a transcript of the voir dire examination of jurors unless the transcript is requested by the defendant. But if such transcript is requested, it is granted as a matter of course. State v. Fowler, 285 N. C. 90, 103-107 (1974).

The Supreme Court of North Carolina in the Fowler case said, 285 N. C. at 107:

> It is the primary duty of defense counsel to prepare and docket a true and adequate transcript of the record of the case on appeal in a criminal case. State v. Fox, 277 N. C. 1, 175 S.E. 2d 561 (1970); State v. Roux, 263 N. C. 149, 139 S.E. 2d 189 (1964); G.S. 15-180; G.S. 1-282. It is also the duty of the solicitor to scrutinize the copy that the appellant serves upon him. If it contains errors or omissions, it is the solicitor's responsibility to file exceptions or countercase. State v. Fox, supra. If, as in the present case, defense counsel desires to take exception to the act of the Court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the voir dire examination as to that juror in the case on appeal. He should not take exception to his own failure to prepare and docket a true and adequate transcript of the record in the case on appeal. Such action is not approved.

The principle underlying the right to counsel case, Gideon v. Wainwright, 372 U.S. 335 (1963), is that the criminal defendant should have at his disposal a trained advocate who knows the law and is able to adequately preserve his rights. All that has happened in this case is that Honeycutt's counsel failed to request that a transcript of the voir dire examination be made and failed to put a transcript of that voir dire examination into the record. In no sense of the word has the State of North Carolina denied this petitioner a transcript of the voir dire examination of jurors in his case in order that he might preserve his rights under Witherspoon v. Illinois, supra.

6. Constitutional due process does not require that a jury include black members where the defendant is a black when there is no systematic exclusion of blacks from jury service. (Petitioner Noell's Question No. 5).

Petitioner Noell, (No. 73-6876, Question No. 5) challenges his conviction on the grounds that the State used its peremptory challenges in such a way that all the black veniremen were ultimately excluded from the petit jury.

The record demonstrates that the black veniremen were excluded for cause, because they knew the defendant or his family and because they further stated that their knowledge of defendant and his family would prevent them from being able to return a fair and impartial verdict upon the evidence presented. A very few of the black veniremen were excluded because of their expressed attitudes toward returning a verdict which might entail the imposition of capital punishment. Only one black venireman was excluded peremptorily by the State.

In State v. Peoples, 131 N.C. 784, 42 S.E. 814 (1902) the North Carolina Supreme Court held that the North Carolina Constitution, Art. I, § 24 requires the sustaining of a motion to quash an indictment of a Negro who proves that the members of his race have been systematically excluded from the juries of the county in which he was indicted. The North Carolina courts have consistently followed that principle to the present, State v. Knight, 269 N.C. 100, 152 S.E. 2d 179 (1967).

As the North Carolina Supreme Court said in this case, 284 N.C. at 683, 202 S.E. 2d 750, 759:

> Defendant's mere showing that all Negroes in this case were challenged by the solicitor is not sufficient to establish a prima facie case of an arbitary and systematic exclusion of Negroes. The record is silent about any prior instances in which the solicitor challenged Negroes from the jury. The defendant has the burden of showing such arbitary and systematic exclusion, and he has failed to carry that burden.

And at 284 N. C. at 682, 202 S.E. 2d at 758, the court said:

> A defendant has no right to be tried by jury containing members of his own race or even to have a representative of his own race to serve on the jury. Defendant does have a right to be tried by a jury from which members of his own race have not been systematically and arbitarily excluded. The burden is upon the defendant, however, to establish racial discrimination in the composition of the jury. State v. Cornell, 281 N.C. 20, 187 S.E. 2d 768 (1972).

In Swain v. Alabama, 380 U.S. 202, 222, (1965) this Court in discussing the question of peremptory challenges stated:

> In the light of the purpose of the peremptory syster... we cannot hold that the Constitution requires examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecuter is using the State's challenges to obtain a fair and impartial jury to try the case before the Court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.

To impute to the solicitor the motive or racial discrimination in the use of his peremptory challenge to one black is wholly unsupported by the record. It must be presumed that he used his challenge to obtain a fair and impartial jury, as our Supreme Court held.

Accordingly, the State contends that petitioner Noell's Question No. 5 should be denied further review by this Court.

7. Constitutional due process does not require a change of venue for the trial of a criminal case merely upon the showing of wide publication of the crime involved. (Petitioner Jarrette's Question No. 4).

Petitioner Jarrette (No. 73-6877, Question No. 4) contends he was denied due process of law in that the trial court did not grant a change of venue on the grounds of prejudicial pre-trial publicity.

Jarrette's evidence consisted of six affidavits stating, in substance, that the affiants had read numerous newspaper accounts concerning the charges against Jarrette; that they had seen various television news programs concerning the crimes with which Jarrette was accused; and that due to that publicity they had formed the opinion that Jarrette was guilty.

The State's evidence consisted of testimony of nine witnesses who testified, in substance, that they believed that the petitioner could receive a fair trial in Union County.

The trial court found:

> [T]hat due to the nature of the [Jaycee] program under which [Jarrette] was being allowed to participate, he received statewide publicity, the Court being of the opinion that the questions presented by the motions can and shall be presented to each juror as they are summoned to the end that no one shall be allowed to serve who has formed and expressed an opinion as to the defendant's guilt on any one of the charges to which he stands trial, and that each prospective juror be questioned by counsel for the defendant as to whether or not he can give the defendant a fair and impartial trial based solely upon the evidence as it comes from the witness stand in the course of the trial and based on nothing else,. . .

Each prospective juror was examined extensively on voir dire prior to being seated. The twelve finally seated each testified they had no fixed opinion of Jarrette's guilt or innocence and could give both the State and Jarrette a fair verdict based only upon the evidence given in open court.

All that has happened in this case, and all that the cases in this Court require, is that the trial judge conduct a hearing respecting the motion for change of venue or change of venire, fairly consider all the evidence, and based on that evidence find that the defendant can receive a fair trial before an unbiased jury.

Under N. C. Gen. Stat. § 1-84, these motions were addressed to the discretion of the trial court. State v. Blackmon, 280 N. C. 42, 185 S.E. 2d 123 (1974). The cases in this Court indicate that on the basis of that statute and the evidence the trial court properly observed due process. Irvin v. Dowd, 366 U.S. 717 (1960); Rideau v. Louisiana, 373 U.S. 723 (1962); Estes v. Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, 384 U.S. 333 (1965); Groppi v. Wisconsin, 400 U.S. 505 (1971).

Accordingly , the State sumbits that petitioner Jarrette's question No. 4 should not be further reviewed by this Court.

B. At the Trial Stage.

1. The Constitutional concept of due process does not require the exclusion of evidence of an independent in-court identification of the defendant as the perpetrator of the crime by the rape victim simply because the victim had previously identified the defendant as the perpetrator in a "show up" during the investigation of the crime by the law officers (Petitioner Henderson's Questions Nos. 2,4, and 5).

Petitioner Henderson (73-6853 Questions Nos. 2,4 and 5) contends his Constitutional rights to due process were violated because he was subjected to a "show up" identification procedure in the investigative stage of the case and he contends that this act of the law officers made the in-court identification by the same eyewitness (the rape victim) inadmissible at the trial.

Our court noted the similarity of the present case with the recent case of Neil v. Biggers, 409 U.S. 188. In the Neil case, this Court noted:

> ...the victim spent a considerable period of time with the assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon out doors, and at least twice, once in the house and later in the woods, faced him directly and intimately ... her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, ... was more than ordinarily thorough. She had 'no doubt' that the respondent was the person who raped her ... She testified ... that there was something about his face 'I don't think I could ever forget.'

The North Carolina Supreme Court then noted a number of factors to be considered in evaluating the likelihood of mistaken identification. These are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, (5) the length of time between the crime and the confrontation.

On the trial court's voir dire hearing respecting the admissibility of the in-court identification the only evidence offered was the testimony of Judith Strader, the victim of the crime.

On the voir dire examination, Miss Strader positively identified the petitioner as her assailant. She testified that the lighting conditions surrounding her trailer at the time of her attack were a light that had been left on in her living room, three street lights near her trailer, one of which shone almost directly into her bedroom window, and a half-full moon. She stated that the defendant had been in her bedroom for about an hour and that they talked for about thirty to thirty-five minutes after the attack. She at that time observed the defendant carefully because she "was looking for facial characteristics, things I might be able to pick out." She stated that her identification of the petitioner was based on "his hair line, length of hair, eyebrows, and lips" and that he had been wearing a shirt, trousers, and laced boots. She stated that she had no

doubt whatsoever about the defendant's being the man who had been in her trailer on the night of the rape, and she based her identification " ... on the face that I saw that night and the face, you don't forget, I won't ever forget it ..."

Our court then stated the rules governing the admissibility of in-court identifications as stated in State v. Tuggle, 284 N.C. 515, 201 S.E. 2d 884:

> When the admissibility of in-court identification testimony is challenged on the ground that it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the test of admissibility. When the facts so found are supported by competent evidence, they are conclusive on an appellate court. State v. McVay, and State v. Simmons, 277 N.C. 410, 417, 177 S.E. 2d 878, 878 (1970); State v. McVay and State v. Simmons, 279 N.C. 428, 432, 183 S.E. 2d 652, 655 (1971); State v. Morris, 279 N.C. 477, 481, 183 S.E. 2d 638, 637 (1971).

In the Neil case, supra, this Court said at 198:

> Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is a 'very substantial likelihood of irreparable misidentification.' Simmons v. United States, 390 U.S. at 384. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.

Unless this Court is willing to state a per se rule of inadmissibility of identification evidence obtained through show up procedures which take place following the decision in Stovall v. Denno, 388 U.S. 293 (1967) then the question as to the admissibility of the identification here poses no substantial question for review by this Court.

2. The Constitutional concept of due process does not require a mistrial where a witness spontaneously and voluntarily gives evidence of a non-inflammatory nature and the trial judge immediately orders the testimony stricken and instructs the jury to disregard the spontaneous utterance of the witness. (Petitioner Noell's Question No. 4; Petitioner Crowder's Question No. 2).

Petitioner Crowder, (No. 73-6878, Question No. 2) and Petitioner Noell (No. 73-6876, Question No. 4) contend that they were denied due process because of prosecutorial misconduct.

In the Noell case the allegation of prosecutorial misconduct is based on the following examination of the witness Mary Ford (R. 43):

Q. (Mr. Pierce) Mrs. Ford, were any tests conducted there at the hospital on Miss DiCenzo?
A. (Mrs. Ford) Yes; there were.
Q. (Mr. Pierce) What were they, if you know of your own knowledge?
A. (Mrs. Ford) There were slides done, surgical secretion, bubble secretion, which is normal procedure in any normal rape case.

In the Crowder case, the following transaction forms the basis for the allegation of prosecutorial misconduct:

> Jacquelyn Otelie Bryant, sister of the deceased, testified that the defendant had been dating the deceased from July or August, 1972 until the date she was shot. The solicitor then asked the witness if she knew of her own knowledge where defendant and deceased met. Defendant's objection to that question was overruled and the witness replied: "She met him in Caledonia in prison." Objection was then sustained and the jury was instructed not to consider the answer. At defendant's request the jury was excused and defendant moved for a mistrial on the ground that the answer was so highly prejudicial the error could not be cured by the Court's instruction. (285 N.C. at 47).

The objection on Constitutional grounds to either of these evidentiary rulings was first made in the petitions in this Court for certorari.

The Supreme Court of North Carolina dealt with both these instructions to the jury to disregard the evidence. In the Noell case, our court said, (284 N.C. at 689, 202 S.E. 2d at 762):

. . .the jury is instructed to disregard such evidence, any prejudice in the admission of such evidence is cured. It is presumed that the jurors followed the court's instructions in this case to disregard this evidence and to dismiss it from their minds. Justice Sharp in State v. Moore, 276 N.C. 142, 171 S.E. 2d 453 (1970) quoted with approval from State v. Ray, 212 N.C. 725, 194 S.E. 2d 482 (1938) wherein it was stated:

> ...[O]ur system for the administration of justice through trial by jury is based on the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instruction of the court, and are presumed to have done so. Wilson v. Mfg. Co., 120 N.C. 94, 26 S.E. 629.

In the present case the court's prompt action in sustaining defendant's objection, allowing his motion to strike, and instructing the jury not to consider what the surgical nurse told her and to dismiss that from their minds - was sufficient to eliminate any possible prejudice to defendant.

Petitioner Crowder contends that when the District Attorney asked the witness if she knew where the decedent met defendant and the witness answered "she met him in Caledonia, in prison," then the only inference to be drawn is that defendant was in prison as a convict and the District Attorney knew that to be a fact and sought to get that answer before the jury.

Such inferences just do not arise. First, the District Attorney's questions only called for a "yes" or "no" answer. Second, there is no more reason to believe the defendant was a convict than that the decedent was a convict. Third, there is no reason to believe that either were convicts instead of employees. Fourth, there is not the slightest hint in the record that the District Attorney knew: (a) where they met or (b) what the witness' answer would be.

Petitioners ask this Court to establish as a rule of law, absent evidence to the contrary, a presumption of misconduct on the part of officers of the court when the officer represents the public against a criminal.

This is a novel concept indeed. For as Justice Ervin (now U.S. Senator, D.N.C.) said in State v. Gaston, 236 N.C. 499 at page 502:

> ...[W]e merely apply the presumption that in the absence of evidence to the contrary, courts are bound to presume that the acts of public officers are in all respects regular. State v. Wood, 175 N.C. 809, 95 S.E. 1050; State v. Bridgers, 87 N.C. 562.

3. Constitutional due process does not require the trial judge to instruct the jury that if the jury convicts the defendant of rape the punishment shall be death, where neither the judge nor the jury has any discretion as to punishment upon conviction of a capital crime (Petitioner Henderson's Question Nos. 11 & 12).

Henderson contends he was denied due process because the trial judge did not instruct the jury that if they found him guilty of rape, the sentence would be death.

The State's contention is that in State v. Henderson, 285 N. C. 1, 203 S.E. 2d 10 (1974) the North Carolina Supreme Court properly applied the general rule:

> ...[T]hat the trial judge has the sole responsibility to render judgements upon jury verdicts upon the limits prescribed by statute. The sole responsibility of the jury is to decide the guilt or innocence of the accused without being hindered by the quantum of punishment possible, probable or certain upon conviction. State v. Davis, 238 N.C. 252, 77 S.E.2d 630; State v. Howard, 232 N.C. 261, 11 S.E.2d 917. (285 N.C. at p. 20).

This decision is further consistent with the language of our court in State v. Waddell, 282 N.C. 431, 435, 193 S.E.2d 19, 29 (1973):

> The punishment to be imposed for these capital felonies is no longer a proper subject for an instruction by the judge.

This being the general rule, the Supreme Court of North Carolina has allowed for an exception to it only in the presence of "compelling reasons." Our court in State v. Rhodes, 275 N.C. 508, 169 S.E.2d 836 (1969), a case decided before Furman (and in North Carolina Waddell), observed that:

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In this jurisdiction, except in one classification, the presiding judge fixes the punishment for a convicted defendant within the limit provided by the applicable statute. The exception is capital cases in which the jury may reduce the penalty from death to life imprisonment.... in all other instances, the jury has performed its function and discharged its duty when it returns its verdict of guilty or not guilty... 275 N.C. 584, 587-589.

...In the absence of some compelling reason which makes disclosure as to punishment necessary in order to keep the trial on an even keel and to insure complete fairness to all parties, the trial judge should not inform the jurors as to the punishment in non-capital cases. If information is requested he should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. When, however, such information is inadvertently given, the error will be evaluated like any other. (275 N.C. at p.592).

Petitioner relies on State v. Britt, 285 N.C. 256 (1974) as an instance in which the right was recognized. However, Britt is clearly distinguishable from Henderson. As our court made clear in Britt:

Thus in a capital case if the jury appears to be confused or uncertain, the trial judge should act to alleviate such uncertainty or confusion. Specifically, if the trial judge observes that the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence, in our opinion, sufficient compelling reason exists to justify his informing the jury of the consequence of the possible verdicts. (285 N.C. at page 272).

In [the Britt] case, when the jury returned the verdict of "first degree murder, with mercy," it became apparent that the jurors were confused as to the law and as to their duties as jurors. At that point the trial judge should have informed them that under the existing law, neither the jury nor the Court had any discretion as to punishment if the jury returned a verdict of guilty of first degree murder. (285 N.C. at p. 272).

The court reinforced its view of the particularly compelling nature of Britt with the following language:

The need for such action on the part of the trial judge is underscored by the fact that on two occasions the trial judge used language in the presence of the jury which might well have left the jury with the erroneous impression that he had some discretion in imposing punishment in the event the jury returned a verdict of guilty of murder in the first degree. Further the gravity of this case, and the apparent confusion and uncertainty among the jurors when the unaccepted verdict was returned, demanded more clarification as to possible verdicts than the statement: 'The verdict must be either guilty of murder in the first degree or guilty of what ever you find him guilty of.' (Emphasis added). (285 N.C. at p.272-273).

It should be noted that our court in Britt did not require the punishment to be administered should be spelled out, but only that the judge make it clear to the jury that neither he nor they had any discretion in this regard should they return a verdict of guilty of murder in the first degree.

In Henderson, no suggestion had been made nor is it apparent from the record that the judge in his instructions gave an erroneous impression to the jury. Further, it is clear that during the deliberations, when some question did arise in the minds of the jurors as to "recommendations," the trial judge made the role of the jury clear in unambiguous terms. Henderson and Britt are distinguishable, in that in Henderson the general rule was properly called for and applied rather than its exception as defined in Britt.

Accordingly, further review of Henderson's question Nos. 11 and 12 should be denied.

4. Constitutional due process does not require that the State permit defense counsel to argue the propriety of the death penalty to the jury when neither the judge nor the jury has any discretion as to punishment upon conviction of a capital crime (Petitioner Dillard's Question No. 2).

Petitioner Dillard (No. 73-6875, Question No. 2) contends he was denied due process because his counsel was not permitted to argue the propriety of the death sentence to the jury.

The State contends the rule that counsel for the defendant may not argue the question of punishment to the jury logically follows the general rule that the determination of punishment is not a matter for the jury. To permit otherwise would be to condone pleas of passion and encourage the jury to ignore the law as it is; to abandon its role as trier of fact, and thus to act instead as a legislature.

This general rule as applied in Dillard must be contrasted with the application of its long standing statutory exception stated thusly in Britt:

Such an argument to the jury would be improper for the reason that the law of this State is otherwise. Counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. He may not, however, state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. See, State v. Banner, 149 N.C. 519, 526, 63 S.E. 84. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely.

State v. Dillard, supra, did not hold that counsel, in his argument to the jury, cannot inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge. Rather Dillard stands for the proposition that counsel may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the imposition of the death penalty. (State v. Britt, 285 N.C. at p. 273).

The petitioner's claim that the court, by denying his request to argue the question of punishment, deprived the defendant of his right to recite the law as it is, as permitted in Britt, ignores the fact that the petitioner could have easily, and with considerable case and statutory precedent, so read the applicable statute. In this case the petitioner either failed to recognize or otherwise ignored this distinction and our court should not be required to "read between the lines" of such a request. See State v. Crisp, 244 N.C. 407, 94 S.E. 2d 402, 67 A.L.R. 2d 236; Annot. 67 A.L.R. 2d 245 (1956).

Accordingly, petitioner Dillard's Question No. 2 should be denied further review by this Court.

5. Constitutional due process does not require the trial judge to instruct the jury as to lesser included offenses when the charge laid in the indictment and all of the State's evidence introduced at trial tend to prove that only the capital offense, if any, was committed. (Petitioner Henderson's Question No. 13).

The contention of petitioner Henderson in his Question No. 13 seems to be addressed to the failure of the trial court to charge the jury with respect to the lesser included offenses of burglary and rape.

As our court said in this case, 285 N.C. at 22, 203 S.E.2d at 24:

The necessity of instructing a jury as to an included crime of lesser degree than the one charged arises only when there is evidence supporting the included crime of lesser degree. State v. Watson, 283 N.C. 383, 196 S.E.2d 12; State v. Bryant, 280 N. C. 551 187 S.E.2d 111; State v. Carnes, 279 N.C. 549, 184 S.E.2d 235; State v. Murry, 277 N.C. 197, 176 S.E.2d 738; and State v. McNeil, [280 N.C. 159, 185 S.E.2d 156].

It is difficult to understand the petitioner's contention that he was denied due process of law because the only evidence introduced by the prosecution went to the proof of the capital crimes of burglary and rape. The jury thus had to find the petitioner guilty or not guilty of those crimes and those crimes alone, rather than the more numerous conviction options which would have been open to the jury had there been instructions on the lesser included offenses. The State introduced evidence tending to show the guilt of the petitioner of only two crimes, and the State had the burden of proving beyond a reasonable doubt each and every element of those two crimes, including that Henderson was the perpetrator thereof.

I seems that petitioner's argument regarding the defense of alibi is confused with something else. It is settled in North Carolina that the defendant is entitled to an instruction on the defense of alibi whether he requests it or not. State v. Vance, 277 N.C. 345, 177 S.E.2d 389 (1970); State v. Spencer, 256 N.C. 487, 124 S.E.2d 175 (1962). The burden of proving the defense of alibi does not rest on the defendant. In State v. Walston, 259 N.C. 385, 386, 130 S.E. 2d 636 (1963) the court stated at page 386:

> The burden of proof rests upon the State to establish beyond a reasonable doubt all elements of the offense charged, including the defendant's presence at the place of the crime, at the time of its commission, where that is essential to his guilt.

In State v. Vance, supra. at 347 our court said, quoting State v. Spencer, supra.:

> An accused, who relies on an alibi does not have the burden of proving it. It is incumbent on the State to satisfy the jury on the whole evidence that such accused is guilty. If the evidence of an alibi, in connection with all other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal. (Citations omitted.)

stitutional question. The leading case in the Fourth Circuit Court of Appeals on this point is Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960). The language of the Court in that case is most apropos to the question raised here, 283 F. 2d at 802:

> The points made in the present proceeding all pertain to state law and in the context of the trial we find no indication of fundamental unfairness. We express no opinion as to the state court's resolution of the issue raised. Even if we were to disagree, we could not intervene..., when the alleged errors are of a character that cannot reasonably be said to involve a deprivation of constitutional rights. Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances inpugning fundamental fairness or infringing specific constitutional protections that a federal question is presented.

Accordingly, the State contends petitioner Henderson's question No. 13 should not be further reviewed by this Court.

C. At the Appellate Stage.

1. The concept of Constitutional due process does not require that the State assume the burden of proving the negative of any issue raised by a defendant on appeal in a capital case. (Petitioner Henderson's Question No. 10).

Petitioner Henderson (73-6853 Question No. 10) contends that because of the severity of the death penalty the burden of proving that State officials have not acted in an arbitrary, capricious, or discriminatory manner toward the defendant should fall upon the State on appeal and absent such proof, Constitutional due process requires the reversal of his conviction.

As the cases cited by Henderson in his petition simply do not stand for any such proposition of law whether Constitutional or otherwise, the contention is difficult to respond to.

The existing law in North Carolina is that it will be presumed that a public official in the performance of an official duty has acted in good faith and in accordance with the law and the authority conferred on him. The burden is upon the party

asserting the contrary to overcome the presumption by competent and substantial evidence, Housing Authority of Wilson v. Wooten, 257 N.C. 358, 126 S.E.2d 101 (1962).

Allegata without probata will not prevail in the courts of North Carolina and should not prevail in this Court:

> . . .The ends of criminal justice would be defeated if judgments [of courts] were to be founded on a partial or speculative presentation of the facts. . . . U.S. vs. Nixon, ____U.S.____ 41 L.Ed. 2d at p. 1064 (1974).

Accordingly, the State contends Henderson's question No. 13 should not be reviewed by this Court.

CONCLUSION

The State of North Carolina, Respondent in each of the captioned cases, respectfully requests this Court deny each of the petitioners' petitions for writs of certiorari to the Supreme Court of North Carolina except that Respondent has no objection to a review of the question whether capital punishment is cruel and unusual per se.

Respectfully submitted this the 20th day of September, 1974.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a Deputy Attorney General licensed to practice law in the State of North Carolina and the United States Supreme Court.

That on October 8, 1974, he served a corrected copy of the attached RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA to the persons hereinafter named, at the places and addresses stated below by depositing said envelope and its contents in the United States mail at Raleigh, North Carolina.

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Supreme Court, U.S.
FILED
JAN 13 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina affirming petitioner's conviction of first degree murder and sentence of death by lethal gas is reported at 285 N.C. 90, 203 S.E.2d 803 (A. 88-104). The oral opinion

of the Superior Court of Wake County finding petitioner guilty and sentencing him to die is unreported, and appears at A. 5-7.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. § 1257 (3)(1970), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgement of the Supreme Court of North Carolina was entered on April 22, 1974. (A. 104-105). The petition for certiorari was filed on July 9, 1974, and was granted on October 29, 1974. (A. 105).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves N.C. Gen. Stat. § § 14-17, 15-187, 15-188 (repl. vol. 1969), as construed in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973), which provide:

> "§ 14-17. *Murder in the first and second degree defined; punishment.*—A murder which shall be

> perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.
>
> § 15-188. *Manner and place of execution.*—The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this article."

QUESTION PRESENTED

Does the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Following a jury trial in the Superior Court of Wake County, petitioner Jesse Thurman Fowler, a 24-year old black man (A. 3), was sentenced on September 27, 1973, to die for the first degree murder of an acquaintance, Mr. John Griffin.

This July 1, 1973, shooting grew out of an argument between Griffin and petitioner over a dice game and a fist fight earlier in the day. The two men were long-time friends who "were rather well acquainted" and who "partied together most of the time." (A. 16). They had lived together in Washington, D.C., during 1969, and petitioner had gotten a job for Griffin. (*Ibid.*).[1] Witnesses for both the State and petitioner

[1] Petitioner described their relationship:

> "I have been knowing John Griffin since about '60. I met him in Raleigh. I knew him well when I went to Washington, D.C. in 1969; we socialized together .... John came up to Washington and stayed with me for about three or four months. I got him a job at the same place I was working in General Maintenance – cleaning apartments and cutting grass. During the two years I have been back in Raleigh I have seen him several times off and on." (A. 51).

testified that Griffin had a reputation for contentiousness.[2]

On the day of the altercations which led to the shooting, a fishing expedition had been planned which never materialized. (A. 34-35). That morning, petitioner

[2] One Johnny Dolby, called by the State, testified that "[s]ome folks say John [Griffin] will knock you in the head if you turn your back" (A. 16), and added that "when he started to drinking, John Griffin had a big mouth" (A. 17). Sylvester Jones, testifying for the defense, gave a similar description:

> "Q. [defense counsel] You indicated in response to the solicitor's question – he asked you had you ever had a fight with John Griffin and you said not exactly. What sort of conflict, if any, had you ever had with John Griffin?
> A. We had an argument. I don't know if he was jiving or serious or what, you know. Seem like most of the guys that I hang around with, be around my house at the time, something will be done and say something. We don't know if they want to fight or what. John Griffin and I had arguments, over money, over girls – things like that. Like he did get in a lot of arguments. Like I said, I don't know if he was serious or what, you know. Like you can half understand. You don't know if he is serious at times or what, you know. He like to talk a whole lot. He would shoot a lot of bull. I was not afraid of John Griffin.
> Q. Did you take much of what he said seriously?
> A. All depends on what, on how I was. If I was sober, I would look at him and laugh but if I had been drinking and half mad myself, I didn't take it." (A. 42).

Another defense witness, Charles Gene Rogers, asserted:

> "John Griffin was prone to get involved in fights. I have been knowing John Griffin a pretty good while. He had a lot of fights and a lot of arguments. Well, I would say he could cause some danger, he had a big mouth. Well, I didn't take seriously what he said because I have been knowing John. I know that he always runs off at the mouth and continues to get whopped a lot by his mouth." (A. 47).

had been drinking rum and scotch at the house of one Wilbert Carter (A. 52), and then had joined in a basketball game. When the game broke up, petitioner, Griffin, one Sylvester Jones, and several other persons went to Jones' house where they began "drinking beer" and "shooting dice for money." (A. 38). Jones left the game to go to the bathroom and asked petitioner to watch his ten dollar bill; when Jones returned, the bill was gone, and he twice demanded to know where his money was. Jones then stood up and declared, "I wasn't playing. I want to know where my money was." (*Ibid.*). Griffin said nothing, and petitioner told him to give Jones his money. (*Ibid.*). Griffin remarked that he "didn't have to steal" (A. 39), returned the ten dollar bill to Jones (A. 38-39), and the game continued without further incident. (A. 41).

During the afternoon, petitioner left the dice game and went to the King's Lounge, where he spent a few hours with his wife and a friend, drinking beer and dozing. (A. 43, 45, 53-54). Griffin and Jones entered the King's Lounge, and began drinking together at a table. When petitioner went to play the jukebox, Griffin called him over and told him "if he pulled that shit like he pulled this morning, that he was going to kick his ass." (A. 39). Petitioner replied that Griffin "wasn't going to do nothing to him," and Griffin invited him outside. (*Ibid.*). Sylvester Jones testified:

> "When John invited [petitioner] ... out, John went out the door first. [Petitioner] ... came behind. When they got outside, John turned around and hit [petitioner] ... and knocked him down. I was the third one to go outside. John Griffin hit [petitioner] ... in the face somewhere. When he knocked him down, I don't know if he kneed him or kicked him, but his nose started bleeding then. That is when I broke it up. [Petitioner] ... went on the side of the building. I don't know where he went. I didn't see him no more. John Griffin came up to me then and asked me for my pistol. He knew that I had a pistol. At the time, I did not have it on me. So I told him, you know, I couldn't do that." (A. 39-40). [3]

[3] Jones also testified that petitioner "said nothing to John to make John think that he needed to have a gun, after I broke the fight up." (A. 42). Another witness to the fight, Charles Gene Rogers, testified:

> "... I saw John Griffin turn around and it appears that he hit somebody. When I got up close, he was down on him with his knee, seemed like he kneed him, too, after he hit him and so I didn't stop to see what it was. I was going to my car and a fellow pulled John Griffin off of this fellow but at the time I didn't know it was Huck [petitioner]. I didn't know Huck was on the ground because I couldn't see who John Griffin hit. Then as he was pulling him, Huck went around the building holding his [redacted] down, which I still didn't know it was him and then John Griffin told the fellow that had pulled him up to let him have a pistol that he was going to kill – well, he used some foul language at the time and he asked him a couple of times for his pistol. So I got in my car and as I was going around the King's Lounge, going out, I seen that it was Huck. Then I recognized it was Huck and I told him, I said, 'Man, you better go ahead on because John Griffin is trying to get a pistol to kill you.'" (A. 46).

Another witness to the fight, James McIntosh, gave a similar description:

> "Well, they were coming out of the door and I was trying to get in. So all of a sudden – John Griffin hit him [petitioner]." (A. 45).

Petitioner also testified that Griffin hit him in the face just as he walked out the door. (A. 54).

Petitioner left the King's Lounge, stopped at his home briefly, and then set out to see his sister-in-law. (A. 55). Shortly thereafter, Johnny Dolby, a nephew of Griffin's, stopped his car and picked petitioner up. (A. 13, 48). When Dolby remarked upon petitioner's bloody shirt, petitioner replied that he had been in a fight with John Griffin. (A. 13). Dolby testified that petitioner appeared to have been drinking and that his eyes were red. (A. 15). As they drove along Branch Street, they observed Griffin and two of his daughters talking to Mrs. Mary Raines; although neither Dolby nor petitioner called to him, Griffin walked toward them and Dolby stopped the car in the street. (A. 17). Griffin "snatched the door of the car open," but closed it again after Dolby remonstrated with him. (A. 14). Griffin declared to petitioner, "I don't want to fight you no more. I want you to go home" (*ibid.*), and petitioner said nothing (A. 17). Dolby concluded that this was simply "big talk" on Griffin's part (A. 49); he testified that although he did not know whether Griffin had been drinking, "[i]t sounded like he might have been" (A. 17). Petitioner then asked Dolby to drive him home (A. 14), but after Dolby had driven about half a block, petitioner had him stop, and petitioner left the car and walked back in the direction of Griffin (*ibid.*).

Eyewitness accounts of what happened next differ. Mrs. Mary Raines, who had been conversing with Griffin when Dolby's car stopped on Branch Street heard Griffin say to a man in the car "I am tired of you all bugging me." (A. 9). A few minutes after the car drove away, she testified that two men came running up from the direction in which the car had gone and that one of them fired two shots at Griffin

"and then I heard the gun say 'Click, click.' " (A. 9).[4] Mrs. Raines did not know the men in the car, although she assumed they were Griffin's "friends" (A. 9), and she could not identify petitioner as the person who did the shooting (A. 10).

An acquaintance of petitioner's, Charles McCoy, testified that as he was walking to his home on Branch Street at about dusk on July 1, he heard Griffin declare to petitioner and another man in a car, "take him on home before I make him use what he has in his pocket." (A. 20). A few minutes later, McCoy noticed petitioner walking along Branch Street from the direction in which the car had driven away. He testified that "I think [petitioner] ... stopped [Griffin's daughter] ... and asked where was John [Griffin]." (A. 19). McCoy, who was walking toward petitioner, felt someone bump him from behind and saw that Griffin was standing or crouching behind him. He then observed petitioner, who was three to four feet away (*ibid.*), step to the side and fire a pistol twice at Griffin. McCoy, who sustained powder burns on his left hand, saw petitioner walk away, as Griffin stumbled down the embankment to the apartment below. (*Ibid.*).

Griffin's nine-year old daughter, Paula, testified that shortly before the shooting, petitioner had walked up to her and asked her where her father was. When she told him she didn't know, she saw him fire two shots at Griffin: "[a]t the time that Jesse stepped off to the side [to shoot], Daddy was coming up close behind

[4] There was no other testimony concerning the identity of the second man who, according to Mrs. Raines, accompanied the armed man.

McCoy." (A. 33). Griffin's eleven-year old daughter, Jonice, also testified to seeing petitioner fire two shots at Griffin; just before the shooting, she observed Griffin "hiding" (A. 31) behind McCoy and advancing toward petitioner:

> "I saw my father hiding behind McCoy. McCoy was walking toward his house. My father was walking behind him, crouched down .... I saw my father get behind Mr. McCoy when Jesse came out of the car .... My father got behind McCoy, and started tipping behind him." (A. 32).[5]

After the shooting,[6] petitioner walked away, stopping at the King's Lounge for a drink (A. 59); he returned home, then talked to Sylvester Jones, stating that he had shot John Griffin and wanted to turn himself in "but .... he was kind of scared." (A. 41). Jones accompanied petitioner to the police station. Petitioner was interrogated by Raleigh Police Detective D.C. Williams early on the morning of July 2. Williams

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[5] The testimony of all the witnesses leaves it exceedingly unclear whether, when Griffin was "hiding" behind McCoy, he was advancing toward petitioner or retreating away from petitioner. The testimony does make clear that, at the time of the shooting, Griffin and petitioner must have been very close together. (McCoy testified that "John [Griffin] bumped into the back of me" just before the shooting. (A. 19). He also testified that petitioner was standing "three to four feet from me" when Griffin was shot and that the discharge from petitioner's pistol caused powder burns on his hand. (*Ibid.*).)

[6] Before Griffin died, he declared in response to Raleigh policeman Kenneth Johnson's question that "'Jesse Fowler'" had shot him. (A. 23). There was no testimony as to whether Griffin was armed at the time he was shot.

testified that "I smelled the odor of intoxicants on his breath" (A. 29) and that petitioner's eyes were "real bloodshoot" (*ibid.*), but he added that petitioner "appeared to me to be in complete control of both his mental and physical faculties" (*ibid.*). A laceration on petitioner's nose which Williams observed was later determined to indicate a broken nose. (*Ibid.*). Williams testified at some length concerning the statement petitioner made:

> "First of all, Mr. Fowler advised me that he wanted me to know and understand that when he shot John Griffin, he was drunk. He told me that he had gotten drunk on Saturday night. When he got up around 11:00 a.m. on Sunday, he had started drinking again. Stated since Saturday night he had drunk approximately sixteen beers, one pint of scotch, approximately one quart of wine; that after he had gotten up on Sunday, he went to Sylvester Jones' house, started playing dice. Shortly after he got there Sylvester Jones got up and went to the bathroom and left ten dollars lying on the floor; that when Sylvester returned, it was gone, the ten dollars on the floor. When Sylvester returned an argument started between Jesse and John Griffin over the ten dollars. Said [nothing] resulted from this argument.
>
> After they left ... Jess Fowler and his wife went to King's Lounge on Rock Quarry Road sometime around 6:00 p.m. After they had arrived there, John Griffin and Sylvester Jones came in and started drinking beer. Said Jesse went to play a record on the juke box and John Griffin came over to his table and wanted to start an argument again in reference to the ten dollars at the dice game.

John Griffin asked Jesse Fowler to come outside and to fight him. Mr. Fowler stated that he went outside and just as soon as he walked out the door, John Griffin hit him in the face, knocking him down and causing his nose to start bleeding real bad. Sylvester Jones at this time came over and stopped the fight and that Jesse Fowler and his wife went home. Stated at this time he had a .38 caliber pistol in his pocket with him.[7] After going home and staying a few minutes, he headed for Walnut Terrace to see a friend . . . .

When he got to Lenoir Street, Ronald [sic] Dolby picked him up and drove him to Walnut Terrace and they got to Branch Street; they saw John Griffin again on the sidewalk. Stated John Griffin came over to the car, opened the car door and wanted to fight him again. At this time, he told Dolby to let him out of the car so he would not get into any trouble. Stated that he started walking away and John came after him.

When John came after him, this is Mr. Fowler doing the talking – I turned and shot at him and missed. I then shot at him again and hit him. I dropped the gun and walked away.

At this time, I am high off beer and wine, but I know what I am doing and I am in my right state of mind." (A. 28-29).[8]

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[7]Petitioner had this pistol in his possession during the entire day. (A. 45, 52, 61). Witnesses testified that it was the normal practice of petitioner and his friends to carry pistols with them when they went fishing in order to be able to kill snakes. (A. 35, 38).

[8]Petitioner testified that Detective Williams' recapitulation of petitioner's oral statement of July 2 was "pretty much the same thing" he related at the police station. (A. 60).

Petitioner presented nine witnesses in his defense and also testified at length himself. He admitted the shooting, but claimed it had been in self-defense:

"John [Griffin] was headed directly down the street toward where I was standing. So I put my hand in my pocket and he pushed Charles McCoy in the back and I pulled my gun out of my pocket and I shot it one time. I kind of shot it up like in the air. I was not trying to hit anybody. I was hoping that, you know, he was turning backward.

Before I fired I saw John crouched behind McCoy for a couple of seconds or so. Charles was still between me and John. Then that is when John pushed McCoy and said, 'Nigger, I am going to make you use what you have got in your pocket.'

That is when I pulled my gun out and shot hoping he would turn around and go back. So he didn't turn. Looked like he was running faster toward me and that is when I put the gun down like this and shot him. When I shot the second time, I was as far from him as from here to that Officer. After I shot the gun, I presumed it hit him. I didn't know because he turned around and looked like he started running back down the street. I put my gun down by my side and walked across the street here." (A. 57-58).[9]

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[9]On cross-examination, the following exchange occurred between petitioner and the Solicitor:

"Q. Why did you feel it was necessary to use that gun instead of using your fists or running away; why did you have to use that gun?
A. Like I said, the first thing came to my mind John had been asking for a pistol and said that he was going to kill me. I just took my gun out and shot. If he had one to shoot me, he kept coming [sic]. So I shot the second time down and he turned around and I said, well must not have nothing [sic] and I turned around and walked off.

(continued)

Petitioner asserted that he "thought he [Griffin] was going to do something to me" (A. 58) and that he had heard Griffin "was trying to get a gun" (*ibid.*).[10]

At the conclusion of the testimony, the court instructed the jury it could return a verdict of not guilty, guilty of voluntary mansalughter, guilty of second degree murder, or guilty of first degree murder. (A. 83-84). The jury found petitioner guilty of first degree murder, and the court thereupon sentenced him to die. Petitioner's conviction and sentence were affirmed by a divided Supreme Court of North Carolina on April 10, 1974. 285 N.C. 90, 203 S.E.2d 803. (A. 88-104).

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

On appeal to the Supreme Court of North Carolina, petitioner's Assignment of Error Number 9 asserted that "[t]he imposition and the carrying out of the death

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> I didn't see a gun. When I saw John coming toward me behind Charles, I did not want to fight anymore. My intention was to get on away from there.
> Q. Weren't you pretty hot about the fact that John Griffin had mashed up your nose, kneed you in the face, kicked you when he had you down on the ground in front of your friends down in front of King's Lounge, sort of humiliated you?
> A. Nothing but a little fight. A fight that I lost. It won't [sic] the first one that I had lost." (A. 65-66).

[10]Three other witnesses testified that Griffin had asked for a pistol immediately after the fight outside the King's Lounge. (A. 40, 44, 46).

penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States . . . ." (A. 88). The Supreme Court of North Carolina explicitly rejected this contention and sustained the constitutionality of petitioner's death sentence, citing its prior decisions in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973); *State v. Blackmon*, 284 N.C. 1, 199 S.E.2d 431 (1973); and *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721 (1974). (A. 103-104).

SUMMARY OF ARGUMENT

I.

While "mandatory" in form, the North Carolina procedure for processing capital cases involves a series of uncontrolled discretionary judgements that operate to spare the lives of some defendants while others in similar circumstances are sentenced to die. As administered through such a system, the penalty of death is a cruel and unusual punishment because it has fallen in this case, and will inevitably fall, arbitrarily upon the isolated defendant, exceptional for his failure to arouse the conscience of one of many participants in the criminal justice process who have explicit or disguised power to spare his life.

II.

The punishment of death inflicted in this manner also violates the Eighth Amendment because it is

excessive and affronts the principle of human worth embodied in the prohibition of cruel and unusual punishments. No legitimate penal purpose of the State justifies the extreme cruelty of extinguishing human life; and this is in fact the verdict of Twentieth Century American history upon the death penalty. Repudiated in general application, it is tolerated only when imposed upon a random few. But the Eighth Amendment stands to assure that irregular and arbitrary exceptions are not made to the limitations imposed by contemporary standards of decency upon the State's power to punish.

ARGUMENT

I.

INTRODUCTION

In *Furman v. Georgia*, 408 U.S. 238 (1972), and its companion cases, this Court ruled that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-240. The Court accordingly entered orders vacating the death sentences of 125 condemned men in 26 States.[11]

On remand, these orders were effectuated;[12] and state courts also granted sentencing relief to other men

[11] *See Stewart v. Massachusetts*, 408 U.S. 845 (1972) and companion cases, 408 U.S. 932-941 (1972); *Moore v. Illinois*, 408 U.S. 786 (1972).

[12] *See, e.g., McCants v. State*, _____ Ala. _____, 274 So.2d 303 (1973); *State v. Sinclair*, 263 La. 377, 268 So.2d 514 (1972); *Bartholomey v. State*, _____ Md. _____, 297 A.2d 696 (1972); *State v. Terry*, 485 S.W.2d 3 (Mo. 1972); *Menthen v. State*, 502 P.2d 1304 (Okla. Ct. Cr. App. 1972).

condemned to die before *Furman* under statutes which provided for the discretionary imposition of the death penalty by juries or trial judges.[13] The result of these decisions was almost universally to forbid the infliction of capital punishment in the absence of new legislation. *See, e.g., State v. Rhodes,* _____ Mont. _____, 524 P.2d 1095 (1974); *State v. Speights,* _____ S.C. _____, 208 S.E.2d 43 (1974). Thirty States subsequently enacted some form of death penalty legislation,[14] commonly providing for a narrower range of capital offenses than those States maintained before *Furman.*[15]

[13] *See, e.g., Graham v. State*, 253 Ark. 462, 486 S.W.2d 678 (1972); *Reed v. State*, 267 So.2d 70 (Fla. 1972); *Peterson v. State*, 268 So.2d 333 (Miss. 1972); *State v. Cuckovich*, 485 S.W.2d 16 (Mo. 1972); *State v. Flonnory*, 31 Ohio St.2d 134, 285 N.E.2d 726 (1972).

[14] The statutes are summarized in Appendix A, pp. 1a-68a *infra*.

[15] With two exceptions, these States have either reduced the number of capital crimes, narrowed the definition of crimes for which the death penalty is retained, or done both. Before *Furman*, Rhode Island Gen. Laws §11-23-2 (1969) provided a death penalty for murder by a life-term prisoner. Rhode Island Public Law 1973 (Ex. Sess.), ch. 280, §1 amended this section to provide the death penalty for murder by anyone "while committed to confinement to the adult correctional institutions or the state reformatory for women." Before *Furman*, New Mex. Stat. Ann. § 40A-29-2.1 (2d repl. vol. 1972) provided the death penalty "for the crime of killing a police officer or prison or jail guard while in the performance of his duties and . . . if the jury recommends the death penalty when the defendant commits a second capital felony after time for due deliberation following commission of a capital felony." New Mex. Stat. Ann. § 40A-29-2 (1973 supp.) now provides the death penalty for a "capital felony," and New Mex. Stat. Ann. § 40A-2-1 defines first degree murder and specifies that this crime is a "capital felony." *See* Appendix A, pp. 55a and 42a-43a *infra*.

North Carolina, however, took a very different course.[16] Although the North Carolina Supreme Court had previously vacated several death sentences on *Furman* grounds,[17] it ruled prospectively in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (January 18, 1973), by a vote of four to three,[18] that the death

[16]*See* note 22 *infra.*

[17]*See, e.g., State v. Blackmon*, 284 N.C. 1, 199 S.E.2d 431 (1973); *State v. Watkins*, 283 N.C. 504, 196 S.E.2d 750 (1973); *State v. Westbrook*, 281 N.C. 748, 191 S.E.2d 68 (1972); *State v. Doss*, 281 N.C. 751, 191 S.E.2d 70 (1972); *State v. Chance*, 281 N.C. 746, 191 S.E.2d 65 (1972); *State v. Hamby*, 281 N.C. 743, 191 S.E.2d 66 (1972); *State v. Miller*, 281 N.C. 740, 190 S.E.2d 841 (1972).

[18]Chief Justice Bobbitt, Chief Justice-Elect Sharp, and Mr. Justice Higgins dissented in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19, 30-48 (1972) from the majority's interpretation of *Furman*, and have dissented from each subsequent affirmance of a death penalty on *Waddell* grounds. *See State v. Sparks*, ____ N.C. ____, 207 S.E.2d 712, 720 (1974); *State v. Honeycutt*, 285 N.C. 174, 203 S.E.2d 844, 849 (1974); *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803, 815 (1974) (A. 104); *State v. Crowder*, 285 N.C. 42, 203 S.E.2d 38, 47 (1974); *State v. Henderson*, 285 N.C. 1, 203 S.E.2d 10, 27 (1974); *State v. Dillard*, 285 N.C. 72, 203 S.E.2d 6, 9 (1974); *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750, 770 (1974); *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721, 747-750 (1974).

> "I do not think *any death sentence* may be constitutionally inflicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment .... [T]his Court has no right to ignore, delete or repeal these provisions, which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death

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penalty could continue to be imposed for North Carolina's four pre-*Furman* capital crimes[19] without the enactment of new legislation. In *Waddell*, the appellant had been condemned to die for rape under a statute, N.C. Gen. Stat. §14-21 (repl. vol. 1969), which provided:

> "[e]very person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment

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> sentence was permissible. *Furman* did not repeal them. This Court has no right to repeal them."

State v. Waddell, supra, 194 S.E.2d at 31 (dissenting opinion of Chief Justice Bobbitt) (emphasis in original).

> "The question of capital punishment ... is one of momentous public policy .... It is not for this Court to declare either by unanimous decision or by four-three division."

State v. Jarrette, supra, 202 S.E.2d at 750 (dissenting opinion of Chief Justice-Elect Sharp).

> "The fixing of punishment for crime is a legislative function."

State v. Waddell, supra, 194 S.E.2d at 44 (dissenting opinion of Mr. Justice Higgins).

[19]At the time of *Waddell*, a death penalty was authorized as the punishment for first degree murder, N.C. Gen. Stat. §14-17 (repl. vol. 1969); rape, N.C. Gen. Stat. §14-21 (repl. vol. 1969); first degree burglary, N.C. Gen. Stat. §14-52 (repl. vol. 1969); and arson, N.C. Gen. Stat. §14-58 (repl. vol. 1969).

shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."[20]

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[20]The other North Carolina statutes authorizing the imposition of the death penalty contained similar provisions empowering the jury to make a binding recommendation of mercy:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison."

North Carolina General Statutes § 14-17 (repl. vol. 1969);

> "Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. Anyone so convicted of burglary in the second degree shall suffer imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

North Carolina General Statutes §14-52 (repl. vol. 1969);

> "Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

North Carolina General Statutes §14-58 (repl. vol. 1969).

After analyzing the opinions of the concurring Justices in *Furman*,[21] the *Waddell* majority concluded that "capital punishment has not been declared unconstitutional *per se*," 194 S.E.2d at 25, and that "[i]t is the proviso [authorizing the jury to recommend mercy in a capital case] and the proviso alone – which creates the discretionary difficulty condemned by the *Furman* decision." 194 S.E.2d at 26-27. The majority held that *Furman* invalidated *only* this proviso, and that the remainder of §14-21, providing a "mandatory" death penalty for rape, was fully operative:[22]

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[21]"[S]ince the decision in *Furman* is not grounded on prior decisions of the Court, the scope of that holding must be gleaned from the separate opinions of the Justices themselves." *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19, 23 (1973).

[22]The Delaware Supreme Court also ruled initially that the effect of *Furman* was to invalidate the provisions of that State's capital punishment laws which empowered the jury to recommend mercy, leaving a "mandatory" death penalty for first degree murder. *State v. Dickerson*, 298 A.2d 761 (Del. 1972). However, *Dickerson* has been nullified (although not explicitly overruled) by a later decision which applies a subsequently enacted Delaware statute retrospectively to forbid the subjection of any defendants to the *Dickerson* "mandatory" death penalty. *State v. Smith*, Del. Sup. Ct. No. 52, 1974 (July 31, 1974).

Trial court rulings similarly "severing" discretionary capital punishment statutes to create "mandatory" death penalties have been reversed by state supreme courts in Montana and South Carolina, in decisions which held the capital punishment provisions of these States' pre-*Furman* statutes wholly inoperative. *State v. Rhodes*, _____ Mont. _____, 524 P.2d 1095 (1974); *State v. Speights*, _____ S.C. _____, 208 S.E.2d 43 (1974). The Utah Supreme Court has reversed a similar

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"It is the proviso which confers upon juries the discretion to send one defendant to death and another to prison for life for the same crime committed under substantially similar circumstances. This, and only this, is what *Furman* condemns as violative of the Eighth and Fourteenth Amendments. The proviso, then, can no longer be given effect as part of the law of North Carolina. This leaves in effect the original statute making the death sentence mandatory upon a conviction of rape, and forbids an instruction to the jury that it may, in its discretion, fix a different punishment.

. . . .

[W]e hold that the effect of the *Furman* decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore

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ruling although its decision appears to permit some form of discretionary capital punishment, notwithstanding *Furman*. *State v. Winkle*, Utah Sup. Ct. No. 13280 (Nov. 18, 1974).

Similar severability decisions by trial courts are now pending on appeal in state supreme courts. *State v. Martin*, Pa. Sup. Ct. No. 44 (March Term 1974); *Commonwealth v. Johnson*, Mass. Sup. Jud. Ct. No. 15, 428.

no longer a proper subject for an instruction by the judge."

194 S.E.2d at 28-29.[23] Under the procedure thus established, at least 52 defendants[24] have been sentenced to die in North Carolina for offenses committed between January 18, 1973 (the date of the *Waddell* decision) and April 8, 1974 (the date when a new North Carolina capital punishment statute went into effect).[25]

Petitioner's case presents the single question whether he and the more than half a hundred other persons condemned to die pursuant to *Waddell* can constitutionally be put to death. To the extent that *Waddell* represents the mere decision of a state-law question of statutory severability – however tortuous,[26] and

[23] The court held, however, that appellant Waddell could not be sentenced to death consistently with the ex post facto clauses of the federal and state constitutions. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19, 29 (1973).

[24] *See* Appendix B, pp. 1b-7b *infra*.

[25] This statute was enacted on April 8, 1974 effective immediately. It repealed the death penalty for first degree burglary and arson, divided the crime of rape into "first degree rape" and "second degree rape" and retained the death penalty only for "first degree rape," and retained the death penalty for first degree murder. The new statute does not, by its terms, have retrospective application. *See* Appendix A, pp. 45a-46a *infra*.

[26] *See United States v. Jackson*, 390 U.S. 570, 580 (1968):

"[i]t is one thing to fill a minor gap in a statute – to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality."

however exemplary of the kind of "luck-of-the-draw justice"[27] through which life is forfeited by fortuity[28] whenever capital punishment is practiced – it is of course unreviewable here. But this is not the first time in recent years that this Court has encountered uses of state-law severability doctrine to emasculate a constitutional decision forbidding the imposition and carrying out of impermissible death sentences. *Funicello v. New Jersey*, 403 U.S. 948 (1971) (alternative ground); *Thomas v. Leeke*, 403 U.S. 948 (1971).[29] Such uses

[27]BEDAU, THE DEATH PENALTY IN AMERICA 411 (rev. ed. 1967).

[28]*See* note 63 *infra*.

[29]These two cases involved provisions of New Jersey and South Carolina law which allowed capitally-charged defendants to avoid the possibility of a death sentence by pleading *non vult* (in New Jersey) or guilty (in South Carolina), and thus affronted the rulings in *United States v. Jackson*, 390 U.S. 570 (1968), and *Pope v. United States*. 392 U.S. 651 (1968). The South Carolina Supreme Court in *Thomas* recognized the incompatibility of its State's statutory guilty-plea scheme with the constitutional principle of *Jackson*, but held that the result was to invalidate and sever the guilty-plea provision, leaving the death penalty standing. The New Jersey Supreme Court attempted to distinguish *Jackson* but held alternatively that, if *Jackson* did invalidate New Jersey's *non vult* provision, that provision rather than the death penalty would be rendered inoperative. In both cases, then, the state-court reaction to decisions of this Court invalidating a composite statutory death-sentencing procedure under which unknown numbers of capital defendants had escaped the death penalty while others had unconstitutionally been sentenced (and many sent) to their deaths, was to sever the escape clause, treat it as though it had never existed for constitutional as well as state-law purposes, and condemn those denied its benefits to die. In both cases, this Court rejected the device, and reversed.

require the Court to look beyond state-law doctrinal adjustments and to apply the Constitution to the realities of what the state courts "do in fact." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

What *Waddell* has done in fact is to change the rules, but not the nature or the result, of the "ghastly . . . lottery"[30] prohibited by *Furman*. During the quarter of a century between the enactments of the recommendation-of-mercy provisos by the North Carolina legislature and the date of *Waddell*, countless men died and others guilty of identical crimes were spared from death pursuant to one form of arbitrary selective procedure which – as the North Carolina Supreme Court itself concludes – fell unmistakably under *Furman's* prohibition. The response of four Justices of that court is to say essentially that, because the persons spared should not have been spared (under an appropriate elaboration of state severability theory), the fact that they were spared is to be disregarded in determining whether the continued application of the pre-*Furman* statute authorizing capital punishment would be arbitrary and selective, and hence a cruel and unusual punishment, in the wake of *Furman*. Henceforth, *different* arbitrary selective procedures are to be used to decide whether particular defendants are or are not "fit to live";[31] that

[30]West, *Medicine and Capital Punishment* in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess. on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970).

[31]*Witherspoon v. Illinois*, 391 U.S. 510, 521 n.19 (1968).

intractable judgment is to be made in numerous covert ways which conceal while increasing the irregularity, irrationality, and irresponsibility of the life-or-death decisions. (*See* Part II, pp. 26-101 *infra.*) Moreover, the historical lesson learned through decades of overtly discretionary capital sentencing – that the death penalty is no longer "widely accepted,"[32] but is instead resoundingly repudiated by the institutions of criminal justice that have actually borne the terrible responsibility for choosing between life and death as the disposition for even the most heinous of offenders (*see* Part III, pp. 102-140 *infra*) – is to be ignored, as though it never happened. With all respect, this result is heedless of *Furman*, heedless of reality and history, and forbidden by the Eighth and Fourteenth Amendments.

II.

THE ARBITRARY INFLICTION OF DEATH

Although the prevailing *Furman* opinions differ somewhat in regard to the questions left unanswered by the square holding of that case, each opinion condemns at least any system of capital punishment in which some persons are chosen to live and others identically situated are consigned to die by irregular and erratic

[32] *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion of Chief Justice Warren).

selective processes.[33] *Furman* thus accords contemporary recognition to a central historic concern of the

[33] The concurring opinions of Mr. Justice Brennan (408 U.S. at 257-306) and Mr. Justice Marshall (408 U.S. at 314-373) shared the view that the death penalty is unconstitutional *per se* regardless of the presence or absence of selectivity in the procedural system through which it is administered.

Mr. Justice Douglas did not reach the question "[w]hether a mandatory death penalty would . . . be constitutional" if it were in fact applied wholly non-selectively, 408 U.S. at 257, but held the death sentences under review in *Furman* and companion cases incompatible "with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments," *ibid.*, because they were "imposed pursuant to a procedure that gives room for the play of . . . prejudices," 408 U.S. at 242, and allows the application of capital punishment "selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." 408 U.S. at 245.

Mr. Justice Stewart found it "unnecessary to reach the ultimate question" whether "the infliction of the death penalty is constitutionally impermissible in all circumstances," 408 U.S. at 306, since he found that the death sentences under review were returned "under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed," 408 U.S. at 310, and therefore violated the Eighth and Fourteenth Amendments. "[O]f all of the people convicted of rapes and murders . . ., many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-310 (footnote ommitted).

Mr. Justice White declined to consider the question whether "the death penalty is unconstitutional *per se*," 408 U.S. at 311, and held only that capital punishment was unconstitutional when it "is exacted with great infrequency even for the most atrocious crimes and . . . [when] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313.

Eighth Amendment: "that government by the people, instituted by the Constitution, . . . not imitate the conduct of arbitrary monarchs." *Weems v. United States*, 217 U.S. 349, 376 (1910).

As this Court has recognized,[34] the Cruel and Unusual Punishments Clause of the Eighth Amendment is derived from the almost identically worded Tenth Clause of the English Bill of Rights of 1689.[35] The preamble to the Bill of Rights declared that James II had endeavored to "subvert" the "laws and liberties of this kingdom" by arbitrarily "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws, without consent of parliament."[36] The first two Clauses accordingly declared such conduct on the part of the King and the royal

[34] *In re Kemmler*, 136 U.S. 436, 446 (1890).

[35] Modern historical scholarship lends support to this conclusion. *See* SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 41 (1971). The "Declaration of Rights," which William and Mary signed on February 13, 1689, before their coronation, was reenacted with minor additions as a statute (the "Bill of Rights") by Parliament later that year. 1 W. & M., sess. 2, ch. 2 (1689), VI STAT. OF THE REALM 142-145. *See also* 5 PARL. HIST. ENG. 483-490 (1688-1704) (Cobbett ed. 1809); BROWNING, ENGLISH HISTORIC DOCUMENTS 1660-1714 122-128 (1953); BAXTER, BASIC DOCUMENTS OF ENGLISH HISTORY 159 (1968). Clause 10 provides: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 5 PARL. HIST. ENG. 485 (1688-1704) (Cobbett ed. 1809). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[36] Of particular concern to Parliament was James II's claim that the royal prerogative authorized him to ignore the statutes prescribing religious qualifications for the holding of public office, 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 87, 89 (1938), and to imprison subjects when no statute or common law principle authorized such a punishment, 2 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 515 (1850). This royal claim was facilitated by the 1686 decision of the King's Bench in *Godden v. Hales*, 2 Show. K.B. 475, 89 Eng. Rep. 1050, 11 Howell St. Tr. 1197 (Trinity Term, 2 Jac. 2) (1686), a collusive action arranged by James II before handpicked judges to secure judicial approval of the royal power arbitrarily to disregard the enactments of Parliament. KENYON, THE STUART CONSTITUTION, 1603-1688 420-426 (1966). The Court ruled: "That the laws of England are the King's laws, That therefore it is an inseparable prerogative in the Kings of England to dispense with penal laws in particular cases and upon particular reasons, That of those reasons and those necessities the King himself is the sole judge." 11 Howell St. Tr. at 1199. This decision confirmed the Parliamentary belief "that the Crown must be limited, controlled, and [made] inferior to the laws of the land," HUGHES & FRIES, CROWN AND PARLIAMENT IN TUDOR–STUART ENGLAND 291 (1959); the realization by both Whigs and Tories "of the inadequacy of the laws of Parliament to withstand the attacks of the King was the beginning of their rejection of James and the real commencement of the revolution of 1688." *Id.* at 294.

judges illegal,[37] and Clause 10 prohibited the infliction of "cruel and unusual punishments." The legislative history of this provision makes clear that it was intended to prohibit the infliction of harsh punishments that were arbitrarily imposed.[38]

While the Bill of Rights was pending in Parliament, an Anglican clergyman, Titus Oates, appealed his 1685 perjury conviction to the House of Lords. Oates had

[37] These two Clauses flatly overruled *Godden v. Hales, supra* note 36, declaring:

> "1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal. 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."

5 PARL. HIST. ENG. 485 (1688-1704) (Cobbett ed. 1809). A significant new phrase was also added to the Coronation Oath: henceforth, the ascending monarch was to swear to govern according to "the statutes in Parliament agreed upon, and the laws and customs of the same." WILLIAMS, THE EIGHTEENTH–CENTURY CONSTITUTION, 1688-1815: DOCUMENTS AND COMMENTARY 3, 37 (1960). "The oath in its previous form had pledged the King to 'grant and keep' the laws and customs 'granted' by his predecessor. If the laws were merely the King's grants, then it might be contended that he could revoke them. Henceforth, it was plain that he was bound by the laws." 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 176-177 (1938).

[38] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 859 (1969); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 844 (1972).

been convicted in the King's Bench of giving false testimony during the "Popish Plot" trials of 1678-1679, and had been sentenced to be defrocked, to serve a term of life imprisonment, to pay a large fine, to be twice severely whipped, and to be pilloried four times a year.[39] This punishment was harsh,[40] discriminatory and arbitrary in the extreme – a manifest attempt to avenge Oates' anti-Catholic intrigues against James II (who had then been Duke of York) by the imposition of punishments that were both unauthorized by statute and outside the jurisdiction of the sentencing court.[41]

[39] For discussions of this phase of the *Oates* case, see CLARK, THE LATER STUARTS, 1660-1714 88-92 (1934); BROWNING, ENGLISH HISTORICAL DOCUMENTS, 1660-1714 12-15 (1953); 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1642-1801 61-65 (1938); LANDON, THE TRIUMPH OF THE LAWYERS: THEIR ROLE IN ENGLISH POLITICS, 1678-1689 181-183 (1969).

[40] The lengthy flogging prescribed for Oates was apparently intended to be fatal: "the court, having no power to hang him, plainly intended that he should be flogged to death." 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND 1642-1801 142 (1938). This was the contemporary understanding of the court's intent. In 1689, the House of Commons resolved "[t]hat it was illegal, cruel, and of dangerous example that a freeman [Oates] should be whipped in such a barbarous manner, as, in all probability, would determine in death." 5 PARL. HIST. ENG. 387 (1688-1704) (Cobbett ed. 1809).

[41] Imprisonment for life could not at that time be imposed for perjury (a misdemeanor), 4 THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND, 1660-1801 142 (1938); and "[o]nly a spiritual court could degrade a priest," *ibid.* According to Macaulay, "that the sentence [imposed on Oates] was illegal was a proposition that admitted of no dispute." 3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 308 (1850).

Oates' conviction and sentence were affirmed in the House of Lords, with thirteen of the Members dissenting strongly on the grounds that these punishments were "cruel, barbarous, and illegal" and "contrary to the Declaration [of Rights] of the 12th of Feb. last . . . whereby it doth appear, that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel nor unusual punishments inflicted."[42] Oates

[42]5 PARL. HIST. ENG. 291-292 (1688-1704) (Cobbett ed. 1809). This dissent declared:

> "1. 'For that the King's-bench, being a temporal court, made it part of the Judgment, That Titus Oates, being a clerk, should, for his perjuries, be divested of his canonical and priestly habit, and to continue divested all his life: which is a matter wholly out of their power, belonging to the ecclesiastical courts only. 2. For that the said Judgments are barbarous, inhuman, and unchristian. And there is no precedents [sic] to warrant the punishments of whipping, and committing to prison for life, for the crime of perjury; which yet were but part of the punishments inflicted upon him ... 4. For that this will be an encouragement, and an allowance, for giving the like cruel, barbarous, and illegal Judgments hereafter, unless this Judgment be reversed. 5. Because sir John Holt, sir Henry Pollexfen, the two Chief Justices, and sir Robert Atkins chief baron, with six Judges more (being all that were then present), for these and many other Reasons, did, before us, solemnly deliver their Opinions; and unanimously declare, That the said Judgments were contrary to law, and ancient practice; and therefore erroneous, and ought to be reversed. 6. Because it was contrary to the Declaration of the 12th of Feb. last, which was ordered by the lords spiritual and temporal, and commons, then assembled; and by their Declaration ingrossed in parchment, and inrolled among the Records of parliament, and recorded in Chancery; whereby it doth appear, that excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel and unusual punishments inflicted.' "

then sought relief in the House of Commons, where his cause was strongly taken up by militant Protestants, who secured passage of a resolution "That Bills be brought in to reverse the Judgments against Mr. Oates . . . as cruel and illegal."[43] Sir William Williams declared during the debate on this bill: "let any man give us a precedent to square with that Judgment. It makes the Judges arbitrary, and hereafter the Judges may be most injurious in punishing."[44] When a deadlock occurred with the House of Lords over a collateral matter,[45] one of the floor managers from the Lords (whose bill gave Oates more limited relief than the Commons bill) admitted that the Oates judgment was illegal but declared that Oates deserved punishment for his libels. A Member of Commons responded:

> " 'Be it so. This bill gives him no indemnity. We are quite willing that, if he is guilty, he shall be punished. But for him, and for all Englishmen, we demand that punishments shall be regulated by

[43]5 PARL. HIST. ENG. 296 (1688-1704)(Cobbett ed. 1809).

[44]*Id.* at 294.

[45]The Commons had also declared that the perjury judgements against Oates were "corrupt." 5 PARL. HIST. ENG. 392 (1688-1704) (Cobbett ed. 1809), and it was this allegation that the Lords would not agree to. *Id.* at 394.

law, and not by the arbitrary discretion of any tribunal.' "[46]

By the time of the framing of the American Bill of Rights, eight States had adopted prohibitions of "cruel and unusual punishments" that were modeled upon

[46]3 MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 310 (1850). The floor managers of the Commons bill reported back to the House of Commons on their difficulties in securing an acceptable compromise bill from the House of Lords:

> "the commons had hoped, that, after the Declaration [of Rights] presented to their majesties upon their accepting the crown (wherein their lordships had joined with the commons in complaining of the cruel and illegal punishments of the last reign; and in asserting it to be the ancient right of the people of England, that they should not be subjected to cruel and unusual punishments; and that no judgments to the prejudice of the people in that kind ought in any-wise to be drawn into consequence, or example); and after this Declaration had been so lately renewed in that part of the Bill of Rights which the lords had agreed to; they should not have seen Judgments of this nature affirmed, and been put under a necessity of sending up a Bill for reversing them; since those Declarations will not only be useless, but of pernicious consequence to the people, if, so soon after, such Judgments as these stand affirmed, and be not taken to be cruel and illegal within the meaning of those Declarations–That the commons had a particular regard to these Judgments, amongst others, when that Declaration was first made; and must insist upon it, that they are erroneous, cruel, illegal, and of ill example to future ages. . . . That it was surely of ill example for a temporal court to give judgment, 'That a clerk be divested of his canonical habits; and continue so divested during his life.' That it was of ill example, and illegal, that a Judgment of perpetual imprisonment should be given in a case, where there is no express law to warrant it."

5 PARL. HIST. ENG. 386-387 (1688-1704) (Cobbett ed. 1809). Oates was pardoned by King William before the differences between Commons and Lords were finally resolved. *Id.* at 399.

Clause 10 of the English Bill of Rights,[47] and the federal government had inserted a similar provision into the Northwest Ordinance of 1787.[48] Because early American legal history is so obscure, it is not possible to know exactly what the draftsmen of these provisions intended.[49] However, whatever else such clauses were

[47]Virginia Constitution of 1776, Declaration of Rights, §9 (7 THORPE, FEDERAL AND STATE CONSTITUTIONS 3813 (1909); (*see also* RUTLAND, THE BIRTH OF THE BILL OF RIGHTS OF 1791 35-36, 232 (1955)); Delaware Declaration of Rights of 1776, § 16 (1 Del. Code Ann. § 83 (1953)); North Carolina Constitution of 1776, § 10 (5 THORPE, *supra*, at 2788); Maryland Constitution of 1776, § 22 (3 THORPE, *supra*, at 1688); Massachusetts Constitution of 1780, art. 26 (3 THORPE, *supra*, at 1892); New Hampshire Constitution of 1784, §33 (4 THORPE, *supra*, at 2457); Pennsylvania Constitution of 1790, art. 9, §13 ("... nor cruel punishments inflicted") (5 THORPE, *supra*, at 3101); South Carolina Constitution of 1790, art. 9, §4 ("... nor cruel punishments inflicted") (6 THORPE, *supra*, at 3264). *Cf.* Vermont Constitution of 1777, ch. 2, § 35 (6 THORPE, *supra*, at 3747): "To deter more effectually from the commission of crimes, by continued visible punishment of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing, by hard labor, those who shall be convicted of crimes ...."

[48]Ordinance of 1787, The Northwest Territorial Government, art. II (Confederation Congress, July 13, 1787): "All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." *See* 1 U.S.C. xxxvii-xxxviii (1964).

[49]"Legal development is probably the least known aspect of American colonial history. Judicial opinions were not recorded in the colonies, no year books were issued, and the printed materials for legal and judicial history have been so scanty as to preclude the more cautious historians from dealing with this important side of colonial life." MORISON (ed.), RECORDS OF THE SUFFOLK COUNTY COURT, 1671-1680 unpaginated preface (1933).

intended to prohibit, it is unlikely that they were not intended to guard against the arbitrary infliction of harsh punishments. For there is evidence that the colonists were concerned with this issue. In 1635, Governor John Winthrop described the attempts of the Massachusetts Bay Colonists to draft a comprehensive criminal code in order to limit the discretion of the magistrates: "The deputies having conceived great danger to our state in regard that our magistrates, for want of positive laws, in many cases, might proceed according to their discretions, it was agreed, that some men should be appointed to frame a body of grounds of laws, in resemblance to a Magna Charta, which being allowed by some of the ministers and the general court, should be received for fundamental laws."[50] The writings of Blackstone, whose influence on the development of colonial American law was enormous,[51] had echoed the 1689 Parliamentary debates concerning the *Oates* case by stressing the fact that English law did not allow the arbitrary infliction of punishment:

> "it is moreover one of the glories of our English law, that the nature, though not always the quality or degree, of punishment is ascertained for every offence; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment,

[50] WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 1630-1686 5 (1889).

[51] Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 862 (1969). Edmund Burke announced to Parliament in 1775 that almost as many copies of Blackstone's *Commentaries* had been sold in the American colonies as in Great Britain. SUTHERLAND, THE LAW AT HARVARD 25 (1967).

> which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slave to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under . . . . [W]here an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge of his actions."[52]

Finally, the American statesmen who framed the state and federal prohibitions on cruel and unusual punishments in the late Eighteenth Century typically believed that their rebellion against Britain had been justified in order to preserve their inherited English civil rights and political freedoms:[53] "from a purely legal interpretation, the American Revolution itself, as the Americans saw it, was largely the result of England's disregard of the common-law rights of the Colonists."[54] It therefore appears unlikely that they would consciously have

[52] 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 371-372 (1st ed. 1769).

[53] *See* BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 1-54 (1967).

[54] LEVY, ORIGINS OF THE FIFTH AMENDMENT 337 (1968).

rejected or limited any of their traditional liberties,[55] including the right against arbitrary infliction of harsh punishments. George Mason, the author of both the Virginia Declaration of Rights and the amendments proposed to Congress by the Virginia ratifying convention,[56] stressed the necessity of limiting all forms of American governmental authority by such guarantees of individual liberty:

> "In the declaration of rights which that country [Great Britain] has established, the truth is, they

[55]The legislative history of adoption of the Eighth Amendment is sparse and not particularly illuminating as to the purposes of the Framers. *See* 2 ELLIOT'S DEBATES 111 (2d ed. 1863); 3 ELLIOT'S DEBATES 447-448, 451, 452 (2d ed. 1863); 1 ANNALS OF CONGRESS 754 (1st Cong., 1st Sess. 1789). There is evidence, however, that in certain ratifying conventions, opponents of the Constitution feared that, without a Bill of Rights, Congress would be free to devise whatever criminal punishments it wished and that tortures might be instituted. Patrick Henry, for example, declared to the Virginia Convention: "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives [in Congress] .... Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control [a constitutional prohibition on "cruel and unusual punishments"]? .... You let them loose; you do more – you depart from the genius of your country." 3 ELLIOT'S DEBATES 447-448 (2d ed. 1863). There is thus some evidence that the Framers were concerned to limit the discretion of *legislators* to devise punishments, and there is no indication whatsoever in any of the debates that they would have approved an arbitrary freedom on the part of magistrates to impose criminal punishments.

[56]*See* 1 ROWLAND, LIFE OF GEORGE MASON 234-250 (1892).

> have gone no farther than to raise a barrier against the power of the Crown; the power of the legislature is left altogether indefinite ....
>
> But although ... it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States. The people of many states have thought it necessary to raise barriers against power in all forms and departments of Government ...."

1 ANNALS OF CONGRESS 436 (1st Cong., 1st Sess. 1789).

The arbitrary infliction of death which this Court condemned in *Furman* and companion cases arose, of course, from various procedures[57] whereby juries (or judges) were given the option to sentence convicted capital offenders to life (or term) imprisonment or death.[58] But – particularly in the light of *McGautha v. California*, 402 U.S. 183 (1971) – it is impossible to read *Furman* as prohibiting only the explicit statutory annunciation of jury discretion to impose alternative sentences of imprisonment or capital punishment. Surely *Furman* and the Eighth Amendment forbid *any* arbitrarily selective imposition of the "unique penalty" of death,[59] whatever the source or mechanism of the arbitrariness. See *Commonwealth v. A Juvenile*, 1973

[57]For a description of some of these variations, see *State v. Rhodes*, _____ Mont. _____, 524 P.2d 1095, 1099 (1974).

[58]*See McGautha v. California*, 402 U.S. 183, 197-203 (1971).

[59]*Furman v. Georgia, supra*, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

Mass. Adv. Sh. 1199, 300 N.E.2d 434 (1973).[60] The particular *method* of selecting some men to die while others in like cases live with "no meaningful basis for distinguishing" among them[61] cannot be thought constitutionally decisive. For the Federal Constitution is not ordinarily concerned with the forms of state procedure, but with their result. *See, e.g., Chambers v. Mississippi,* 410 U.S. 284, 302-303 (1973); *Mempa v. Rhay,* 389 U.S. 128, 135-137 (1967); *Jackson v. Denno,* 378 U.S. 368, 391 n.19 (1964), It "nullifies sophisticated as well as simple-minded modes" of producing unconstitutional consequences. *Lane v. Wilson,* 307 U.S. 268, 275 (1939). Federal constitutional guarantees cannot – as Justice Holmes wrote in another context – "be evaded by attempting a distinction" of form without a difference in substance. *Davis v. Wechsler,* 263 U.S. 22, 24 (1923).

[60]In *Commonwalth v. A Juvenile*, the Massachusetts Supreme Judicial Court held a "mandatory" death penalty statute unconstitutional under the Eighth Amendment where death was the "mandatory" punishment for a specified crime but discretionary mechanisms existed by which a trial court could avoid subjecting a particular defendant to that "mandatory" sentence. The case involved a juvenile who had been condemned under a statute which made death the "mandatory" punishment for rape-murder. The Court held that when a juvenile could be adjudicated either as an adult for rape-murder (in which case, the death sentence was mandatory, see Mass. Gen. Laws Ann. c. 265 §2) or as a juvenile (in which case no death sentence could be imposed), a death sentence imposed pursuant to the adult "mandatory" statute could not be affirmed, since *Furman* invalidated "*discretionary* imposition of the death sentence." 300 N.E.2d at 442 (emphasis in original).

[61]*Furman v. Georgia, supra,* 408 U.S. at 313 (concurring opinion of Mr. Justice White).

To be sure, *Waddell's* annulment of the North Carolina "recommendation" statute ostensibly made death the exclusive punishment for first degree murder, rape, first degree burglary and arson. But the implementation of the death sentence for this broad range of offenses inevitably required the exercise of vast and uncontrolled selective discretion by district attorneys, trial judges, juries and the Governor in choosing which defendants would live and which would die in cases where the death penalty was potentially applicable after *Waddell.* Language requires that the several practices through which unrestrained and arbitrary discretion infects the administration of the death penalty under *Waddell* be described separately, as we shall do in the following subsections of this brief. But the practices plainly operate cumulatively to produce the kind of extreme uncertainty and unpredictability in the infliction of the death penalty that violates *Furman's* ban.

> "There is . . . danger in treating any one stage [of the criminal justice process] as if it were a self-contained system rather than merely one decision in an ongoing process of interrelated decisions and consequences of decisions. An assumption, explicit or implied, that adjudication is in fact a quasi-automatic, nondiscretionary process, turning solely on matters of sufficient evidence, is a gross oversimplification . . . ."

NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 150 (1966).[62] Thus as demonstrated by Professor Charles

[62]*See also* Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 14-15 (1972).

Black in his recent trenchant analysis,[63] the result of

[63]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974). Professor Black points out the numerous discretionary decisions made at every stage of the criminal justice process, with life and death consequences, and emphasizes:

> "Regarding *each* of these choices, through all the range, one of two things, or perhaps both, may be true.
>
> First, the choice made may be a mistaken one. The defendant may not have committed the act of which he is found guilty; the factors which ought properly to induce a prosecutor to accept a plea to a lesser offense may have been present, though he refused to do so; the defendant may have been 'insane' in the way the law requires for exculpation, though the jury found that he was not. And so on.
>
> Secondly, there may either be no legal standards governing the making of the choice, or the standards verbally set up by the legal system for the making of the choice may be so vague, at least in part of their range, as to be only *apparent* standards, in truth furnishing no direction and leaving the actual choice quite arbitrary.
>
> These two possibilities have an interesting (and, in the circumstances, tragic) relationship. The concept of *mistake* fades out as the *standard* grows more and more vague and unintelligible. There is no vagueness problem about the question 'Did Y hit Z on the head with a piece of pipe?' It is, for just that reason, easily possible to conceive of what it means to be 'mistaken' in answering this question; one is 'mistaken' if one answers it 'yes' when in fact Y did not hit Z with the pipe. It is even fairly clear what it means to be 'mistaken' in answering the question 'Did Y *intend* to kill Z?' Conscious intents are facts; the difference here really is that, for obvious reasons, *mistake is more likely* in the second case than in the first, for it is hard or impossible to be confident of coming down on the right side of a question about past psychological fact.

(continued)

numerous interrelated arbitrary processes in the administration of the death penalty in North Carolina is exactly the result condemned by *Furman*: death sentences which are "wantonly and . . . freakishly imposed." *Furman v. Georgia, supra,* 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

And this means not merely that a few men die for crimes no more atrocious than the crimes of many who are spared.[64] It means also that society's most extreme and irremediable punishment is likely to be practiced principally upon the outcast of society. Discrimination is inseparable from arbitrariness wherever social atti-

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> It is very different when one comes to the question, 'Was the action of which the defendant was found guilty performed in such a manner as to evidence an 'abandoned and malignant heart'?' (This phrase figures importantly in homicide law.) This question has the same grammatical form as a clearcut factual question; actually, through a considerable part of its range, it is not at all clear what it means. It sets up, in this range, not a standard but a *pseudo-standard*. One cannot, strictly speaking, be *mistaken* in answering it, at least within a considerable range, because to be mistaken is to be on the wrong side of a line, and there is no real line here. But that, in turn, means that the 'test' may often be no test at all, but merely an invitation to arbitrariness and passion, or even to the influence of dark unconscious factors.
>
> 'Mistake' and 'arbitrariness' therefore are reciprocally related."

Id. at 19-21 (emphasis in original).

[64]*See, e.g.*, LAWES, TWENTY THOUSAND YEARS IN SING SING 302, 307-310 (1932); DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 254-255 (1962); De Ment, *A Plea for the Condemned*, 29 ALA. LAWYER 440, 440-441 n.2 (1968) (quoting Commissioner A. Frank Lee, of the Alabama Board of Corrections).

tudes make men or groups unequal or unpopular. That had not ceased to be the case in England three centuries after Titus Oates,[65] and it assuredly has not ceased in this country where "[t]hroughout our history differences in race and color have defined easily indentifiable groups which have at times required the aid of the courts in securing equal treatment under the laws."[66] "It is the poor, the illiterate, the underprivileged, the member of the minority group who is usually sacrificed by society's lack of concern."[67] To believe that this discrimination can be ended or controlled by the annulment of forthright jury discretion in capital sentencing in North Carolina blinks reality. For,

> "discretion in the imposition of the death penalty will continue to be exercised in the prosecuting attorney's decision concerning the wording of the charge; the grand jury's decision concerning the

[65]PIERREPOINT, EXECUTIONER: PIERREPOINT 211 (1974):

> "As long as reprieves for the death sentence existed, the reason for a reprieve was always fundamentally political: an execution here would incite too much sympathy for the victim and must be respited; an execution there will show that the Home Secretary means business. The public were allowed to blow like the wind for one popular reprieve of a favourite from Hampstead, and stay dead calm about an unattractive strangling in Ashton-under-Lyne precisely because the same basic inconsistency was being operated for the policy reprieves. The trouble with the death sentence has always been that nobody wanted it for everybody, but everybody differed about who should get off."

[66]*Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

[67]DiSalle, *Trends in the Abolition of Capital Punishment*, 1 U. TOLEDO L. REV. 1, 12-13 (1969). *See also* text and notes at notes 226-227, *infra*.

> allegations of the indictment; the jury's findings concerning the existence of defenses, [and] elements of the crime . . .; and the governor's decision whether to commute the death sentence if one results. Since discretion will not be substantially restricted under the new [procedure] . . ., but merely shifted to other parts of the criminal justice process, there is little reason to expect that disproportionate application to minorities and poor people will not continue."[68]

A. Prosecutorial Charging Discretion

As long ago as 1931, the Wickersham Commission reported that "[t]he Prosecutor [is] the real arbiter of what laws shall be enforced and against whom. . . ."[69]

[68]Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 661-662 (1974). *See also* Note, *Mandatory Death: State v. Waddell*, 4 N.C. CENT. L. J. 292, 298 (1974).

[69]NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 19 (1931). *See also* DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188-214 (1971); authorities collected in note 74 *infra*. *Cf.* MOLEY, POLITICS AND CRIMINAL PROSECUTION vii (1929):

> ". . . I have attempted to indicate the very great importance of the public prosecutor, a fact which is particularly American. The sheriff and the coroner, the grand jury, and finally the petit jury, products of a long historical evolution, have quite faded into insignificance. Likewise, both the examining magistrate and the trial judge in state courts, partially through their own lack of capacity, partly through legal limitations upon their powers, and largely because they have no means for knowing what they should know about the cases before them, perform no dominant role. In the midst of the decay and impotence of his official associates, the prosecutor rises to a definite mastery. To a considerable extent, he is police, prosecutor, magistrate, grand jury, petit jury, and judge in one."

In North Carolina, the prosecuting attorney (called the Solicitor) is charged with the duty to "prepare the trial dockets, [and] prosecute in the name of the State *all criminal actions requiring prosecution* in the superior and district courts of his district," N.C. Gen. Stat. § 7A-61 (1973 cum. supp.) (emphasis added). He is thereby given broad and essentially unreviewable authority to initiate and terminate prosecutions,[70] *State*

[70]A recent death penalty case, where the conviction and sentence were vacated and a new trial ordered because of procedural error, illustrates the Solicitor's charging discretion under *Waddell*. In *State v. Spicer*, 285 N.C. 274, 204 S.E.2d 641 (1974), two persons were tried and convicted for murder during the course of an armed robbery. A third person, one Brailford, had helped to plan the robbery and was to share in its proceeds, but he was not charged in the murder although his testimony "permitted the jury to make a finding that he was an accomplice either in the robbery or the murder, or both." 204 S.E.2d at 647. The Court described Brailford's criminal role in the following fashion:

> "the State's witness Brailford made the admission to the officers, 'I stated that I initiated the proposition concerning the hit of Christian Brothers Poultry. It was my idea.' He again stated he expected his cut. . . .
>
> The evidence discloses that the witness Brailford originated the plan to rob his employer and explained the setup at the plant."

Ibid. The other two persons involved in the robbery, Spicer and one Isaac Monk, were convicted of first degree murder and sentenced to die. Spicer's conviction has been, as indicated, reversed on grounds permitting a retrial and a new death sentence, while Monk's conviction and death sentence are now pending on appeal in the North Carolina Supreme Court. *State v. Monk*, No. 13, New Hanover County, Fall Term, 1974.

v. Loesch, 237 N.C. 611, 75 S.E.2d 654, 656 (1953),[71] including not only absolute discretion whether and what to charge,[72] but also absolute discretion to bring an indicted defendant to trial upon lesser charges than those set forth in the indictment even if the evidence

[71]The Court also ruled in *State v. Loesch*, that the Attorney General had no supervisory jurisdiction over the several Solicitors of the State, whose offices were established by Article III, Section 18 of the State Constitution. "[T]he duty of the Attorney General in so far as it extends to the solicitors of the State is purely advisory. The Attorney General has no constitutional authority to issue a directive to any other constitutional officer concerning his legal duties." 75 S.E.2d at 656.

[72]The grand jury provides no significant check upon prosecutorial discretion since – except in a few extraordinary cases – it is heavily dominated by the prosecuting attorney. *See, e.g.*, Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L. J. 1149, 1171 (1960), and authorities cited; Shannon, *The Grand Jury, True Tribunal of the People or Administrative Agency of the Prosecutor*? 2 NEW MEXICO L. REV. 141, 170 (1972); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L. J. 209, 212-213 (1955). Indeed, it is dubious that even the most conscientious grand juror, zealous to perform the grand jury's function of providing " 'a fair method for instituting criminal proceedings against persons believed to have committed crimes,' " *Costello v. United States*, 350 U.S. 359, 362 (1956) (as quoted in *Russell v. United States*, 369 U.S. 749, 761 (1962)); *accord: State v. Greer*, 238 N.C. 325, 77 S.E.2d 917, 918-919 (1953), by inquiring "into the existence of possible criminal conduct and [returning] . . . only well-founded indictments," *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *see also United States v. Calandra*, 414 U.S. 338, 343 (1974), would suppose that this function called upon him to return an indictment upon charges *greater* than those sought by the prosecutor. And, as we shall shortly see under North Carolina law, if a grand jury did return such an indictment, the prosecutor could elect not to prosecute the offense charged, but only a lesser included offense. *See* text and note at note 73 *infra*.

shows that a greater crime has been committed, *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453, 455 (1971);[73] *and see State v. Roy*, 233 N.C. 558, 64 S.E.2d 840, 841 (1951).[74]

[73]In *State v. Allen*, the Court affirmed a second degree burglary conviction in a case where the sole question presented on appeal was " 'Did the trial court commit error by placing the defendant on trial for burglary in the second degree when all the evidence tended to show burglary in the first degree?' " 181 S.E.2d at 455. The appellant was charged by indictment with first degree burglary, but at trial the solicitor announced he would seek no verdict greater than burglary in the second degree. The Supreme Court of North Carolina ruled that "the solicitor has the authority to elect not to try the defendant on the maximum degree of the offense charged but to put him on trial for the lesser degree thereof and lesser offenses included therein.... The effect of such election by the solicitor, announced as in this instance, is that of a verdict of not guilty upon the maximum degree of the offense charged, leaving for trial the lesser degree and the lesser included offenses." *Ibid.*

[74]*Cf.* Note, *Prosecutorial Discretion*, 21 DePAUL L. REV. 485, 486 (1971-1972):

> "[t]he limitations of a prosecutor's discretion are somewhat nebulous, and, in general, undefined. He has the authority by law to enforce certain laws by prosecuting offenders. Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."

See also MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 154-172, 293-350 (1969); 2 PLOSCOWE (ed), MANUAL FOR PROSECUTING ATTORNEYS 315-320 (1956); Baker & DeLong, *The Prosecuting Attorney*, 24 J. CRIM. L. & CRIM. 1025 (1934); Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507 (1957); Mills, *The Prosecutor: Charging and "Bargaining,"* 1966 U. ILL. L. F. 511; Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955); Note, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L. J. 209, 209-215 (1955).

The North Carolina courts steadfastly refuse to review prosecutorial decisions. The leading case is *State v. Casey*, 159 N.C. 472, 74 S.E. 625 (1912), where an appellant, prosecuted and convicted for second degree murder by poisoning, argued that there was no evidence of this crime; that she was either guilty of first degree murder or not guilty of any offense. The North Carolina Supreme Court rejected this contention, commenting that the appellant had no "privilege to be tried for the capital felony" and concluding that "if the solicitor erred, it is an error in favor of the prisoner, of which she cannot justly complain." 74 S.E. at 625. And following *Waddell*, the court in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721, 742 (1974), flatly rejected the contention that the Eighth and the Fourteenth Amendments required any circumscription of the discretion of the Solicitor in capital cases:

> "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

The consequence of this unfettered prosecutorial discretion is, of course, that different Solicitors may utilize different standards in deciding whether to initiate capital or noncapital prosecutions. Without any guidance whatsoever,[75] a Solicitor is free to make the

[75]*Cf.* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952):

> "[a] society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves."

decision whether an indictment will be sought for first or second degree murder or manslaughter,[76] for rape or assault with intent to rape, for first or second degree burglary. He may thus "without violating [his] . . . trust or any statutory policy . . . refuse to [seek] . . . the death penalty no matter what the circumstances of the crime." *Furman v. Georgia, supra,* 408 U.S. at 314 (concurring opinion of Mr. Justice White). This unconstrained discretion doubtless accounts in considerable part for the striking fact that there have been only three convictions[77] of first degree burglary during a full year of *Waddell's* implementation in a State where there were about forty convictions annually for this crime in

[76]As we demonstrate at pp. 65-76 *infra*, the distinctions among these offenses as they may apply to particular factual situations are largely intangible and judgmental.

[77]*State v. Poole, rev'd for insufficient evidence*, 285 N.C. 108, 203 S.E.2d 786 (1974); *State v. Henderson*, 285 N.C. 1, 203 S.E.2d10(1974), *petition for cert. filed sub nom. Henderson v. North Carolina*, U.S.S.C. No. 73-6853 (June 8, 1974); *State v. Boyd*, N.C. Sup. Ct. No. 7, Spring Term 1974, (pending on appeal). In *State v. Henderson, supra*, the defendant was also convicted of and sentenced to die for rape; and in *State v. Boyd, supra*, the jury was unable to agree on a homicide verdict after it was instructed that it could find the defendant guilty of second degree murder.

the recent past,[78] and where 39,210 "burglaries and housebreakings" were reported in 1972.[79] The conclusion is inescapable that Solicitors have simply not regarded first degree burglary as a crime deserving death, and have not initiated first degree burglary

[78]In 1955, the North Carolina Department of Justice ceased to report separate statistics for persons convicted of first degree burglary and of second degree burglary. In 1952, there were 47 convictions for first degree burglary in Superior Court (with 15 "Other dispositions") and 5 convictions in "inferior court" (with 64 "Other dispositions" there). 32 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1952-1954 515, 521 (1954). In 1953, there were 33 convictions for first degree burglary in Superior Court (with 10 "Other dispositions") and 4 convictions in "inferior court" (with 49 "Other dispositions" there). *Ibid.* In 1954, there were 35 convictions for first degree burglary in Superior Court (with 26 "Other dispositions") and 9 convictions in "inferior court" (with 61 "Other dispositions" there). 33 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1954-1956 377, 379 (1956). "Other dispositions" is nowhere defined; since the total of convictions and "Other dispositions" represents "cases disposed of in the Superior and inferior courts of the State," 32 BIENNIAL REPORT OF THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA 1952-1954 510 (1954), "Other dispositions" apparently includes acquittals and *nol pros's.*

[79]UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1972 74 (Aug. 1973). The Uniform Crime Reports, of course, reflect reported crimes, not convictions; and the reported "burglaries and housebreakings" doubtless exceed the total number of statutory first degree burglaries which occurred in the State during 1972. Nevertheless, it cannot rationally be imagined that only *three* first degree burglars were apprehended in North Carolina during a twelve month period.

prosecutions in cases where they might have obtained convictions for this crime.

The inconsequential number of first degree burglary convictions under the *Waddell* regime is hardly surprising, since the exercise of prosecutorial discretion to blunt the impact of "mandatory" penalties in sympathetic cases has been one of the most significant phenomena observed in the enforcement of such statutes: "[a] charge may be reduced to avoid infliction of punishment harm that administrative officials regard as too severe in relation to the suspect's conduct. Usually, a less serious offense is charged because conviction of the maximum offense carries a statutory mandatory minimum sentence."[80]

As with the death-penalty statutes struck down in *Furman*, it is not necessary to conclude that North Carolina's capital laws are being intentionally administered "with an evil eye and an unequal hand," *Yick Wo*

[80] MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 207 (1969). *Cf.* Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 49 (1972):

> "[o]fficials tend to respond to the undue harshness of punishments provided by the law by seeking discretion to avoid the imposition of that harshness in most cases. Yet, ironically, it is when the system is particularly severe that discretion may be most abusive and the temptation to act unjustly becomes greater. When the system is severe, discretionary decision-making becomes unacceptable because it reposes excessive authority in the hands of an often unsupervised individual official. In such a situation, the advantages of legal rules and process become exaggerated."

v. Hopkins, 118 U.S. 356, 373-374 (1886). The point rather is that their implementation is necessarily and unavoidably *arbitrary*. Since no standards exist to regularize the exercise of prosecutorial discretion, there is nothing to guarantee that some defendants, like petitioner, will not be capitally charged while other defendants, probably guilty of similar conduct, are prosecuted for second degree murder or manslaughter. Although the choice of charge is quite literally the difference between life and death, that choice is a completely uncontrolled, discretionary decision of the Solicitor.

B. Plea Bargaining

Another point of entrance for arbitrariness in the administration of capital punishment in North Carolina under the *Waddell* procedures is the unfettered power of the Solicitor to accept a plea of guilty to a lesser or other non-capital offense from a capitally charged defendant, and/or to *nol pros* a capital indictment. Exercise of this discretionary power undercuts the "mandatory" nature of the death penalty for first degree murder as effectively as the practice of selectively charging homicide defendants with second degree murder or manslaughter at the outset. The guilty-plea process is unregulated by law, and the discretion of a Solicitor to accept a plea to a lesser offense in a capital case is therefore quite as untrammelled as the freedom of a jury to recommend mercy in a pre-*Waddell* capital prosecution.

Plea bargaining is pervasive in the criminal justice system; guilty pleas are said to account for up to ninety per cent of all criminal convictions.[81] Indeed, in view of the judicial resources available, the systematic and extensive practice of plea bargaining appears inevitable:

> "[i]f all the defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state in the Union. But they dare not hold out, for such as were tried and convicted

[81] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). *See also* Coon, *The Indictment Process and Reduced Charges*, 40 N.Y. ST. BAR J. 434 (1968). A study of the indictments for first and second degree murder in Massachusetts between 1956 and 1965 which received a final disposition in terms of guilt or innocence revealed that 221 out of 326 defendants (67.8%) entered a guilty plea and that 93.2% of these guilty pleas were to a lesser charge. Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFF. L. REV. 292, 299 (1969). The study concluded that:

> "there is a wide disparity among the courts in terms of the proportion of guilty pleas in murder cases. This finding indicates that the practice of plea bargaining is far from uniform. It also underscores the potential risk inherent in such an informal and invisible process as plea bargaining. For example, a defendant indicted for first degree murder in one court may have a very good chance of negotiating a plea of guilty to second degree murder, while in another court such a possibility may be minimal. The implications of this are serious, since conviction for first degree murder may well result in a sentence of death.... Therefore, it seems crucial that the practice of plea bargaining be governed by specific and explicit guidelines that could be systematically and consistently applied from court to court."

Id. at 307.

> could hope for no leniency. The prosecutor is like a man armed with a revolver who is cornered by a mob. A concerted rush would overwhelm him.... The truth is that a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty."[82]

Because homicide cases are likely to take up a great deal of time in preparation and trial, they are particularly likely to be settled by plea bargaining.[83] And the fact that the harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error provides an additional incentive for plea bargaining in capital cases:

> " '[s]ince time immemorial . . . [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a murder trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an Appellate Court.' "[84]

[82] LUMMUS, THE TRIAL JUDGE 46 (1937).

[83] In the words of one prosecutor:

> " 'A murder case ties up a courtroom for a week, or at least for three days. We are naturally more anxious to bargain for guilty pleas in murder cases than we are in cases that might take fifteen minutes at trial.' "

Pittsburgh First Assistant District Attorney James G. Dunn, quoted in Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 55 (1966).

[84] Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 30 (1963) (quoting opinion of Judge C. Conrad Schneider, *State v. Faison*, No. 5-550-57, Bergen Cty. Ct., Nov. 21, 1958).

Plea bargaining almost inevitably involves a reduction in charge or sentence: "[a] promise by the prosecutor of sentence leniency or a charge reduction as a concession for a plea of guilty is a major characteristic of the negotiated plea process."[85] This Court is not unfamiliar with guilty pleas to lesser included offenses entered by North Carolina defendants charged with capital crimes, who thereby escaped possible death penalties. *North Carolina v. Alford*, 400 U.S. 25 (1970);[86] *Parker v. North Carolina*, 397 U.S. 790 (1970). Such cases are a commonplace of "capital" justice. *See, e.g., Tollett v. Henderson*, 411 U.S. 258 (1973). Indeed, the prosecutor's attitude toward plea-bargaining in the case of a death-charged defendant is "probably the most widely significant choice separating the doomed from those who . . . go to prison."[87] That attitude in turn reflects fundamentally the prosecutor's choice to insist upon or to remit the punishment of death. For his willingness to offer or accept a lesser plea (and how much lesser) responds not

[85]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 29 (1966).

[86]In *North Carolina v. Alford*, the Court noted that "the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired." 400 U.S. at 37.

[87]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 43 (1974).

merely to his estimate of trial costs and contingencies but also to his wholly discretionary judgment – sometimes reasoned, sometimes "gut," sometimes principled and independent, sometimes politically opportunistic, but always selective and subject to the influence of factors which remain "demeaningly trivial compared to the stakes"[88] – as to whether the particular offense or offender *deserves* capital punishment.[89]

Furthermore, an ostensibly "mandatory" death penalty statute is especially likely to result in the selective allowance of guilty pleas to lesser included offenses, since "[m]any prosecutors and judges . . . support the practice as both necessary and desirable . . . to achieve sentencing flexibility which would sometimes be prevented by mandatory sentences."[90] The negotiated

[88]This phrase was used by the late Professor Harry Kalven, Jr., and by Hans Zeisel to describe the factors affecting capital sentencing by juries before *Furman*. KALVEN & ZEISEL, THE AMERICAN JURY 448-449 (1966). It is equally apt to describe the factors influencing the prosecutor's plea-bargaining discretion after *Furman* and *Waddell*.

[89]*See* BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 41-44 (1974). *Cf.* note 91 *infra*.

[90]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 102 (1966). *Cf.* Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW No. 5, 25, 31-32 (1961):

> "[t]hese plea bargains perform a useful function. We have to remember that our sentencing laws are for the most part savage, archaic, and make very little sense. The penalties they set are frequently too tough . . . . The negotiated plea is a way by which prosecutors can make value judgments. They can take some of the inhumanity out of the law in certain situations."

plea is "the means by which . . . [a prosecutor] can avoid the unacceptably rigorous application of the letter of the law."[91] Prosecutors

> "declare without hesitation that one of their goals in the [plea] bargaining process is to nullify harsh, 'unrealistic' penalties that legislators have prescribed for certain crimes."[92]

It is clear that a great many capitally charged defendants in North Carolina have been allowed to plead guilty to lesser offenses and thus to escape the threat of a death penalty.[93] In other cases, however,

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[91] Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 SO. CALIF. L. REV. 12, 25 (1972). *See also* Worgan & Paulsen, *The Position of a Prosecutor in a Criminal Case – A Conversation with a Prosecuting Attorney*, 7 PRAC. LAW. No. 7, 44, 53 (1961):

> "[i]n many cases we believe we mitigate the harshness of the letter of the law by taking a guilty plea. We make such decisions only after much careful thought and I think we make them in a way that the community generally approves."

[92] Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1966). *See also* 2 PLOSCOWE (ed.), MANUAL FOR PROSECUTING ATTORNEYS 319 (1956); Coon, *The Indictment Process and Reduced Charges*, N.Y. ST. BAR J. 434, 438 (1968).

[93] *See, e.g.*, the following 17 cases: *State v. Hamlin*, Wake County Super. Ct. No. 74-Cr-11895 (April 1, 1974, indictment for first degree murder; April 12, 1974, guilty plea to second degree murder, sentence of 15-20 years); *State v. Leroy Johnson*, Wake County Super. Ct. No. 74-Cr-7160 (February 25, 1974, indictment for first degree murder; March 8, 1974, guilty plea to second degree murder, sentence of 10 years); *State v. Harris*, Wake County Super. Ct. No. 73-Cr-76418 (February 11, 1974,

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solicitors have wanted and achieved nothing less than a

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indictment for rape; August 19, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Santor*, Wake County Super. Ct. No. 73-Cr-68725 (February 11, 1974, indictment for first degree murder; July 15, 1974, guilty plea to voluntary manslaughter, sentence of 20 years); *State v. Lacy Jones*, Wake County Super. Ct. No. 73-Cr-698 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Kenneth Jones*, Wake County Super. Ct. No. 74-Cr-697 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault with intent to inflict serious injury, sentence of 1 year); *State v. Chance*, Wake County Super. Ct. No. 74-Cr-696 (January 21, 1974, indictment for rape; September 16, 1974, guilty plea to assault on a female, sentence of 1 year); *State v. Goldston*, Wake County Super. Ct. No. 73-Cr-73020 (January 7, 1974, indictment for first degree murder; May 24, 1974, guilty plea to voluntary manslaughter, sentence of 7 to 10 years); *State v. Smith*, Wake County Super. Ct. No. 73-Cr-54092 (October 29, 1973, indictment for first degree burglary; February 25, 1974, guilty plea to breaking and entering with intent to commit larceny, sentence of 7-10 years suspended with probation); *State v. Otha Johnson*, Wake County Super. Ct. No. 73-Cr-44188 (August 30, 1973, indictment for first degree murder; April 22, 1974, guilty plea to voluntary manslaughter, sentence of 14-18 years); *State v. Wright*, Wake County Super. Ct. No. 73-Cr-41760 (August 30, 1973, indictment for rape; November 7, 1974, guilty plea to assault on a female, sentence of time served); *State v. Weatherspoon*, Wake County Super. Ct. No. 73-Cr-38571 (August 30, 1973, indictment for first degree burglary; October 12, 1973, guilty plea to felonious breaking and entering, sentence of 1-2 years); *State v. Ramos*, Wake County Super. Ct. No. 73-Cr-30623 (May 29, 1973, indictment for first degree burglary; June 4, 1973, guilty plea to non-felonious breaking and entering, sentence of 2 years suspended with 5 years probation); *State v. DeBoise*, Wake

(continued)

capital conviction and sentence.

Plea bargaining under a "mandatory" statute is frequently said to "provide the opportunity to individualize justice . . . . Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt."[94] The result of this process, however, is thoroughly to vitiate the uniform operation of the statute:

(footnote continued from proceeding page)

County Super. Ct. No. 73-Cr-29233 (May 29, 1973, indictment for first degree burglary; October 22, 1973, guilty plea to felonious breaking and entering, sentence of 4 years suspended with probation); *State v. Stephenson*, Wake County Super. Ct. No. 73-Cr-27254 (May 29, 1973, indictment for rape; April 29, 1974, guilty plea to assault with intent to commit rape, sentence of 10 years), *State v. Franks*, Wake County Super. Ct. No 73-Cr-20787 (April 24, 1973, indictment for rape; April 18, 1974, guilty plea to assault with intent to commit rape, sentence of 10 years); *State v. Franks*, Wake County Super. St. No. 73-Cr-15922 (April 9, 1973, indictment for first degree murder; November 26, 1973, guilty plea to voluntary manslaughter, sentence of 20 years). These cases, terminated by a guilty plea to a non-capital offense, were initiated by capital indictments returned in one of North Carolina's one hundred counties (Wake), the county in which petitioner was indicted, for offenses allegedly committed during the January 18, 1973 – April 8, 1974 period when the capital procedures mandated by *State v. Waddell* were in effect.

[94]Heath, *Plea Bargaining – Justice Off the Record*, 9 WASHBURN U. L. REV. 430, 455 (1970). *See also* NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 98 (1966):

> "[c]harge reduction offers the court an opportunity to individualize justice by distinguishing between technically similar cases in both sentence and conviction label, especially when sentencing discretion is denied by legislatively fixed terms."

> "[i]n both Michigan and Kansas, where mandatory sentences for particular crimes are common, plea negotiation not only is a widespread practice considered necessary to obtain guilty pleas but is generally accepted by both prosecution and the trial courts as desirable in situations where charge reduction is necessary to avoid overly severe sentences."[95]

Such a practice – by which some defendants indicted for capital offenses are permitted to escape with sentences less harsh than death as the result of plea negotiations conducted in the unlimited discretion of the prosecutor – may be thought necessary and proper, and it is doubtless inevitable, to achieve "individualized" and "humane" justice under the exceedingly broad range of death penalties made "mandatory" in North Carolina by *Waddell*. But in the very process of "ameliorating the severity of the more extreme punishment," *United States v. Jackson*, 390 U.S. 570, 582 (1968), it reintroduces exactly the kind of arbitrary selectivity condemned in *Furman*.[96]

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[95]NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 41 (1966).

> "A major characteristic of criminal justice administration particularly in jurisdictions characterized by legislatively fixed sentences, is charge reduction to elicit a plea of guilty."

Id. at 76.

[96]Although properly supervised plea bargaining may not violate Due Process, *see Brady v. United States*, 397 U.S. 742, 750-755 (1970), the result of plea bargaining practices may nevertheless render the administration of a capital punishment statute invalid under *Furman v. Georgia*. This is so for the same reason that the approval of standardless jury sentencing under the Due Process Clause in *McGautha v. California*, 402 U.S. 183 (1971), did not imply (as the subsequent *Furman* decision made clear) that the *results* of such a procedure complied with the Eighth Amendment.

C. Jury Discretion

Despite the annulment of explicit sentencing discretion following a first degree murder conviction, a North Carolina jury still has broad license to spare the life of a capital defendant. It may do so by convicting him of a lesser homicide offense, an attempt or an assault, or by recognizing some amorphously defined defense as a justification or mitigation of the offense, as well as by acquitting him altogether in the teeth of the evidence. Although this jury discretion is less straightforward than under North Carolina's pre-*Waddell* capital procedure, it is equally selective, and its greater diffusion merely injects greater arbitrariness into the disposition of capital offenders at the trial stage.

North Carolina General Statutes § 15-170 (repl. vol. 1969) provides that:

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime. . . ."

Petitioner's jury was charged on manslaughter, second degree murder, and first degree murder (A. 69-84), thereby giving it a *de facto* sentencing power to impose any punishment from a term of four months imprisonment (N.C. Gen. Stat. § 14-18 (repl. vol. 1969)) to a "mandatory" death penalty (N.C. Gen. Stat. § 14-17 (repl. vol. 1969)). The instructions given to this jury are representative of those utilized in most cases where a defendant is charged with "premeditated and deliberated" first degree murder; and a charge on lesser included offenses is not infrequently given even in cases of first degree murder allegedly committed during a felony, *see State v. Knight*, 248 N.C. 384, 103 S.E.2d

452 (1958), or by poisoning, *see State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906). For not only is it the rule that a defendant may demand a lesser-included-offense instruction as a matter of right whenever *any* evidence could conceivably support a lesser conviction,[97] but – as we shall see below[98] – no effective restraint is imposed upon the trial judge's submission of lessers to the jury in the absence of any such evidence.

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[97] "If . . . there is any evidence, or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court under appropriate instructions to submit that view to the jury." *State v. Knight*, 248 N.C. 384, 103 S.E.2d 452, 456 (1958) (quoting *State v. Spivey*, 151 N.C. 676, 65 S.E. 995, 999 (1909)); *State v. Childress*, 228 N.C. 208, 45 S.E.2d 42, 44 (1947). If there is no evidence at all that a defendant was guilty of a lesser included offense, a defendant may not be able to demand such a charge as a matter of right, *State v. Griffin*, 280 N.C. 142, 185 S.E.2d 149, 151 (1971); *State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393, 397 (1971); *State v. Roseman*, 279 N.C. 573, 184 S.E.2d 289, 294 (1971); *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545, 547 (1954); *State v. Brown*, 227 N.C. 383, 42 S.E.2d 402, 404 (1947); *State v. Cox*, 201 N.C. 357, 160 S.E. 358, 360 (1931), and a trial judge has discretion to charge that a defendant is either guilty of the capital crime or not guilty of any crime, *State v. Hairston*, 280 N.C. 220, 185 S.E.2d 633, 642-643 (1972); *State v. Scales*, 242 N.C. 400, 87 S.E.2d 916, 921 (1955); *State v. Mays*, 225 N.C. 486, 35 S.E.2d 494, 496 (1945); *State v. Satterfield*, 207 N.C. 118, 176 S.E. 466, 467-468 (1934); *State v. Chavis*, 80 N.C. 353, 357-358 (1879). However, if a lesser-included offense charge is given in such a situation, and if a defendant is convicted of the lesser without evidentiary support, the conviction will nevertheless be affirmed on appeal. *See State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906), discussed in text at p. 78 *infra*.

[98] *See* text and notes at notes 117-119 *infra*.

The Supreme Court of North Carolina has frequently reversed convictions for capital first degree murder[99] because the trial court failed to give a charge on second degree murder,[100] voluntary manslaughter,[101] or involuntary manslaughter.[102] Indeed, the right to a lesser-included-offense charge is considered so important in

[99]The rule in North Carolina is that "the judge's failure to submit the question of defendant's guilt of the lesser included offense is not cured by a verdict convicting the defendant of the highest offense charged in the bill," *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 465 (1969).

[100]*State v. Knight*, 248 N.C. 384, 103 S.E.2d 452 (1958); *State v. Gause*, 227 N.C. 26, 40 S.E.2d 463 (1946); *State v. Perry*, 209 N.C. 604, 184 S.E. 545 (1936); *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928). When the State attempts to prove "willful, deliberate and premeditated killing," N.C. Gen. Stat. §14-17 (repl. vol. 1969), which did not occur during the course of a felony and was not committed by poison or lying in wait, the jury may decline to return a first degree verdict and convict instead for second degree murder, since "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first degree or second degree," N.C. Gen. Stat. §15-172 (repl. vol. 1969), and since "the jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant." *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 158 (1965). *Cf. State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337, 341-343 (1965); *State v. Drake*, 8 N.C. App. 214, 174 S.E.2d 132, 135 (1970).

[101]*State v. Manning*, 251 N.C. 1, 110 S.E.2d 474 (1959); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617 (1924); *State v. Merrick*, 171 N.C. 788, 88 S.E. 501 (1916). *Cf. State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969).

[102]*State v. Wrenn*, 279 N.C. 676, 185 S.E.2d 129 (1971). *Cf. State v. Freeman*, 280 N.C. 622, 187 S.E.2d 59 (1972); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969).

North Carolina that its omission is held to be reversible error even when the defendant fails to request it. *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970); *State v. Wagoner*, 249 N.C. 637, 107 S.E.2d 83 (1959). *See State v. Moore*, 275 N.C. 198, 166 S.E.2d 652, 661 (1969); *State v. DeGraffenreid*, 223 N.C. 461, 27 S.E.2d 130, 132 (1943). Trial judges are therefore advised to err on the side of inclusion; and, once lesser-offense instructions on second degree murder and manslaughter are included in a first degree murder trial, the jury is given essentially unrestricted discretion to convict alternatively for any of the three crimes. The definitions of the respective offenses under North Carolina law do not distinguish them except in terms of vague, intangible and elusive elements that remain as intractable to objective fact-finding as they are inviting to "any amount of purely 'discretionary' decision."[103]

North Carolina General Statutes §14-17 (repl. vol. 1969) defines as murder in the first degree any

> "murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony."

It then declares second degree murder to be "[a]ll

[103]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 47 (1974).

other kinds of murder."[104] Thus, in a case like petitioner's, "[m]urder in the first degree is the unlawful killing of a human being with malice, premeditation, and deliberation." *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652, 657 (1969). *See also State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, 771-773 (1961); *State v. Payne*, 213 N.C. 719, 197 S.E. 573, 579 (1938). "Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889, 892 (1963). *See also State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 337 (1969); *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942).[105] Manslaughter is not defined by statute[106] but has been declared judicially to be "the unlawful killing of a human being without malice and without premeditation and deliberation." *State v. Kea*, 256 N.C.

[104]The crime of murder was divided into two degrees in 1893. *See* N.C. Acts 1893, ch. 85. Since this date, the common law definition of murder as an unlawful and malicious killing has been applicable only to second degree murder; and to constitute statutory first degree murder, "the killing must be 'wilful, deliberate, and premeditated.'" *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128, 129 (1899). Before 1893, "[a]ny unlawful killing of a human being with malice aforethought, express or implied, was murder and was punishable by death." *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 803 (1970).

[105]"Murder in the first degree is sometimes defined as murder in the second degree plus premeditation," *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 804 (1970).

[106]North Carolina General Statutes §14-18 (repl. vol. 1969) merely provides that the punishment for "manslaughter" shall be imprisonment "for not less than four months nor more than twenty years."

492, 124 S.E.2d 174, 175 (1962). *See also State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 72 (1967); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151 (1910).

The constituent elements that mark the lines between first and second degree murder and manslaughter are extraordinarily hazy and amorphous. "The crime of murder in the first degree is distinguished by a mental process or psychological condition none [too] . . . easy of expression." *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942). Indeed, the North Carolina Supreme Court has declared that the reason for the statutory division of murder into two degrees in 1893 was to "select . . . out of all murders denounced by the common law those deemed more heinous on account of the mode of their perpetration." *State v. Streeton*, 231 N.C. 301, 56 S.E.2d 649, 652 (1949). *See also State v. Cole*, 132 N.C. 1059, 44 S.E. 391, 393 (1903).

> "The passage of the Act of 1893 marks an era in the judicial history of the state. As far as we can ascertain, every other state had previously divided the common-law kind of murder into two classes. The theory upon which this change has been made is that the law will always be executed more faithfully when it is in accord with an enlightened idea of justice. Public sentiment has revolted at the thought of placing on a level in the courts one who is provoked by insulting words (not deemed by the common law as any provocation whatever) to kill another with a deadly weapon, with him who waylays and shoots another in order to rob him of his money, or poisons him to gratify an old grudge. So long as artificial proof of malice is allowed to raise the presumption of murder, this new law will fail to accomplish the object for which it was framed . . . . It is not the severity of

laws, but the certainty of their execution, that accomplishes the end that should be always in view in enforcing them. Heretofore public opinion has approved, and often applauded, the conduct of juries in disregarding the instructions of judges as to the technical weight to be given to the use of a deadly weapon. The consequence has been that, a lax administration of the law being tolerated in such cases, other juries have constituted themselves judges of the law as well as of the facts, when proof has shown a more heinous offense. The experience of a few years will probably demonstrate here, as elsewhere, that fewer criminals will escape under a law which is in accord with the public sense of justice than under one which makes no discrimination between offenses differing widely in the degree of moral turpitude exhibited."

State v. Fuller, 114 N.C. 885, 19 S.E. 797, 802 (1894).[107]

[107]*Cf. State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896) (emphasis in original):

"the act of 1893 says in express terms that the jury before whom the case is tried shall determine the degree of murder. And we do not understand this to mean an unbridled, arbitrary, or mob finding, any more than it was before the statute. Even before the act of 1893 we all know that it was within the *power* of the jury to acquit and turn loose a prisoner, no matter how guilty he might be, and the court was powerless. In fact, it is alleged that they often did this. But is is expected they will find the facts, and apply them to the law given by the court, determine whether the prisoner is guilty or not, and, if guilty, in what degree. We see no reason why they should act differently now to what they did before the statute, and we do not believe they are any more disposed to take the law in their own hands in deciding cases under the act of 1893 than they were before."

First degree murder is defined broadly, though vaguely:

"'[m]alice aforethought' was a term used in defining murder prior to the adoption of the statute dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade .... As used in ... G.S. § 14-17, the term 'premeditation and deliberation' is more comprehensive and embraces all that is meant by 'aforethought', and more."

State v. Hightower, 226 N.C. 62, 36 S.E.2d 649, 650 (1946).[108] The difference between first and second degree murder turns on the presence or absence of "premeditation" and "deliberation":

"[p]remeditation means 'thought beforehand for some length of time, however short.'

....

'Deliberation means that the act is done in [a] cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill,[109] executed by the defendant in a cool state of blood, in

[108]*See also State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 320 (1942):

"[a]s pointed out by the Attorney General, 'aforethought is defined as "premeditated" (Century, Webster), and "premeditated" is defined as "deliberate." '"

[109]The intention to kill which is required for first degree murder, *see, e.g., State v. Robbins*, 275 N.C. 537, 169 S.E.2d 858, 861 (1969); *State v. Stitt*, 146 N.C. 643, 61 S.E. 566, 567 (1908), is sometimes said to be merely an element of premeditation and deliberation. *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 567 (1968); *cf. State v. Gordon*, 241 N.C. 356, 85 S.E.2d 322, 324 (1955).

furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation.' "

State v. Reams, 277 N.C. 391, 178 S.E.2d 65, 71 (1970) (quoting *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922)). *See also State v. Fountain*, 282 N.C. 58, 191 S.E.2d 674, 683 (1972); *State v. Benson*, *supra*. " 'No fixed length of time is required for the mental processes of premeditation and deliberation . . . and it is sufficient if these processes occur prior to, and not simultaneously with, the killing,' " *State v. Perry*, 276 N.C. 339, 172 S.E.2d 541, 547 (1970) (quoting 4 STRONG, NORTH CAROLINA INDEX 196 (2d ed. 1958)). The determination whether "premeditation" and "deliberation" exist is necessarily given over almost entirely to the intuition of the jury[110] because these elements "are not usually susceptible of direct proof, and are therefore susceptible of proof by

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"The line which separates felonious homicides committed . . . without premeditation, from those accompanied by the additional mental condition called 'premeditation,' is shadowy and difficult to fix. The law cannot safely prescribe any uniform and universal rule in regard thereto. As in questions of negligence and the like, it can only define the term, and submit the question of its existence to the jury. It is well settled that the state of mind, intent, sanity, etc., is always a question of fact for the jury."

State v. Daniels, 134 N.C. 671, 46 S.E. 991, 993 (1904). *See also* note 111 *infra*.

circumstances from which the facts sought to be proved may be inferred." *State v. Walters*, 275 N.C. 615, 170 S.E.2d 484, 490 (1969).

"Malice," the factor that separates murder from manslaughter, is equally a matter of inference – and often of inference (or presumption) from the same basic facts that might support the jury's inference of premeditation and deliberation.[111]

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[111] *See, e.g., State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393, 398-399 (1971) (alternative ground), and cases cited.

For example, the North Carolina cases say that malice is "implied" (*see State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922), quoted in text pp. 72-74 *infra; and see, e.g., State v. Payne*, 213 N.C. 719, 197 S.E. 573, 579 (1938); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 421 (1910); *State v. McDowell*, 145 N.C. 563, 59 S.E. 690, 692 (1907)) or "presumed" (*see State v. Sparks*, ____ N.C. ____, 207 S.E.2d 712, 719 (1974); *State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337, 341 (1965)) whenever the defendant's intentional discharge of a deadly weapon results in death. This principle plainly involves an evidentiary presumption that throws upon the defendant the burden of proving (either through the presentation of evidence or through the appearance of mitigating circumstances in the State's case, *e.g., State v. Vann*, 162 N.C. 534, 77 S.E. 295, 298 (1913)) that a killing with a firearm was non-malicious. *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 599-600 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 464 (1969); *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875, 876 (1943), and cases cited. Whether it also means that the prosecution is always entitled to a second degree murder submission in a case where the defendant is armed with a firearm is unclear. *State v. Downey*, 253 N.C. 348, 117 S.E.2d 39, 43 (1960), implies this conclusion, although earlier cases suggest the contrary. *See State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151-152 (1910); *State v. Miller*, 112 N.C. 878, 17 S.E. 167, 168-169 (1893).

(continued)

"Malice is not only hatred, ill will or spite, as it is

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Since *State v. Fuller*, 114 N.C. 885, 19 S.E. 797 (1894), the North Carolina Supreme Court has consistently iterated the rule that premeditation and deliberation – unlike malice– are *not* "presumed" from an intentional discharge of a deadly weapon resulting in death. *E.g., State v. Reams*, 277 N.C. 391, 178 S.E.2d 65, 71 (1970). As expressed in *Fuller*, this doctrine seemed to forbid a permissive inference, as well as a presumption, of premeditation and deliberation. However, later expressions of the *Fuller* rule speak only of the impropriety of a "presumption," *see e.g., State v. Reams, supra*, 178 S.E.2d at 71; *State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, 772 (1961); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188, 190 (1950); *State v. Bowser*, 214 N.C. 249, 199 S.E. 31, 33 (1938); *State v. Miller*, 197 N.C. 445, 149 S.E. 590, 592 (1929); *cf. State v. Booker*, 123 N.C. 713, 31 S.E. 376, 380 (1898), and of the shift of the burden of proof which a true presumption implies, *cf. State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 566-568 (1968). Collateral doctrinal developments have undercut the notion that an *inference* of premeditation and deliberation may not be drawn from intentional use of a deadly weapon: "[p]remeditation and deliberation are not usually susceptible to direct proof but must be established from the circumstances surrounding the homicide." *State v. Sanders*, 276 N.C. 598, 174 S.E.2d 487, 499 (1970), *rev'd on other grounds*, 403 U.S. 948 (1971); *see also State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974); *State v. Evans*, 198 N.C. 82, 150 S.E. 678, 679-680 (1929); *State v. Hamilton*, 19 N.C. App. 436, 199 S.E.2d 159, 160 (1973). The jury is to determine premeditation and deliberation from " 'all the attendant circumstances' " under which the homicide is committed, *State v. Bowser*, 214 N.C. 249, 199 S.E. 31, 34 (1938), including "the manner of the killing, [the defendant's] ... acts and conduct attending its commission," *State v. Robertson*, 166 N.C. 356, 81 S.E. 689, 692 (1914); any "vicious and brutal circumstances," *State v. Duboise*, 279 N.C. 73, 181

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ordinarily understood – to be sure that is malice

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S.E.2d 393, 399 (1971); and the "use of grossly excessive force," *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974) (quoting *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539, 545 (1973)). "[P]remeditation and deliberation may be inferred from a vicious and brutal slaying of a human being." *State v. Reams*, 277 N.C. 391, 178 S.E.2d 65, 71 (1970). Thus, it is no surprise that the North Carolina Supreme Court has abandoned its early occasional practice of reversing first degree murder convictions (*see State v. Cole*, 132 N.C. 1069, 44 S.E. 391 (1903); *State v. Bishop*, 131 N.C. 733, 42 S.E. 836 (1902) (alternative ground); *State v. Rhyne*, 124 N.C. 847, 33 S.E. 128 (1899); *State v. Thomas* 118 N.C. 1113, 24 S.E. 431 (1896) (alternative ground)) for insufficiency of evidence of premeditation and deliberation. Not since 1903 has a North Carolina appellate court held evidence insufficient to permit a finding of premeditation and deliberation, and therefore to support a first degree murder conviction – even though reversals for insufficient evidence of matters such as identity are common, *e.g., State v. Poole*, 285 N.W. 108, 203 S.E.2d 786 (1974) (capital burglary); *State v. Jones*, 280 N.C. 60, 184 S.E.2d 862 (1971) (second degree murder). Numerous cases sustain first degree murder verdicts where virtually nothing more than an unprovoked killing with a deadly weapon was established by the prosecution. *See, e.g., State v. Perry*, 276 N.C. 339, 172 S.E.2d 541 (1970); *State v. Old*, 272 N.C. 42, 157 S.E.2d 651 (1967); *State v. Lamm*, 232 N.C. 402, 61 S.E.2d 188 (1950); *State v. Matheson*, 225 N.C. 109, 33 S.E.2d 590 (1945); *State v. Hammonds*, 216 N.C. 67, 3 S.E.2d 439 (1939); *State v. Walker*, 173 N.C. 780, 92 S.E. 327 (1917); *State v. Ferguson*, 17 N.C. App. 367, 194 S.E.2d 217 (1973).

The upshot, then, is that, in all but perhaps the rarest case of a killing by a defendant armed with a deadly weapon, no judicial control is exercised over the power of the jury to convict of any offense from manslaughter through first degree murder. The jury may or may not infer premeditation and deliberation from the same evidence which gives rise to the presumption of malice; and it may or may not find that presumption overcome to its "satisfaction" (*see* pp. 82-83 *infra*) by evidence of mitigation.

– but it also means that condition of mind which prompts a person to take the life of another without just cause, excuse or justification . . . . It may be shown by evidence of hatred, ill will, or dislike, and it is implied in law from the killing with a deadly weapon. . . ."

State v. Benson, 183 N.C. 795, 111 S.E. 869, 871 (1922).[112] *See also State v. Foust*, 258 N.C. 453, 128 S.E.2d 889, 893 (1963); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151 (1910); *State v. Tilley*, 18 N.C. App. 300, 196 S.E.2d 816, 818 (1973).

Definitions of this kind allow a jury almost complete freedom to return a capital or non-capital verdict not only upon the same evidence but upon the same factual interpretation of the evidence, finding or declining to find "premeditation," "deliberation" or "malice" in accordance with the desired sentencing consequences. To recognize this obvious truth is not to impugn the fidelity of jurors to their oaths but only to acknowledge that they are human. *See Jackson v. Denno*, 378 U.S. 368, 388-389 (1964). Legal formulations spelling the difference between life and death in terms that are "refractory to the best-instructed human understanding"[113] do not merely permit – they imperatively require – the exercise of non-objective, non-factual, discretionary judgments and "the play of . . . prejudices."[114] "[I]n a great many close cases, no matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve laypersons have no alternative to using their general sense of the equities of the matter."[115] Long ago, Justice (then Chief Judge) Cardozo recognized that the obscure distinctions between capital and non-capital grades of homicide – in particular, the concept of premeditation and deliber-

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[112]Proof of a fight between the decedent and the defendant or threats uttered by the decedent to the defendant is often sufficient to negate the inference of malice. *See, e.g.*, the following cases in which defendant was convicted of manslaughter: *State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 70-72 (1967); *State v. Camp*, 266 N.C. 626, 146 S.E.2d 643, 644-645 (1966); *State v. Suddreth*, 230 N.C. 239, 52 S.E.2d 924, 925 (1949); *State v. Church*, 229 N.C. 718, 51 S.E.2d 345, 346 (1949); *State v. Beachum*, 220 N.C. 531, 17 S.E.2d 674, 675 (1941); *State v. Bright*, 215 N.C. 537, 2 S.E.2d 541, 542 (1939); *State v. Reynolds*, 212 N.C. 37, 192 S.E. 871, 871 (1937); *State v. Baldwin*, 184 N.C. 789, 114 S.E. 837, 838 (1922); *State v. Yates*, 155 N.C. 450, 71 S.E. 317, 317-318 (1911). However, a verdict of second degree murder is often affirmed in cases arising out of similar factual circumstances. *See, e.g.*, the following cases in which defendant was convicted of second degree murder; *State v. Cole*, 280 N.C. 398, 185 S.E.2d 833, 833-834 (1972); *State v. Feaganes*, 272 N.C. 246, 158 S.E.2d 89, 89-90 (1967); *State v. Barber*, 270 N.C. 222, 154 S.E.2d 104, 105-107 (1967); *State v. Morgan*, 245 N.C. 215, 95 S.E.2d 507, 507-508 (1956); *State v. Wingler*, 238 N.C. 485, 78 S.E.2d 303, 305-306 (1953); *State v. Russell*, 233 N.C. 487, 64 S.E.2d 579, 580 (1951); *State v. Taylor*, 226 N.C. 286, 37 S.E.2d 901, 901-902 (1946); *State v. Brinkley*, 183 N.C. 720, 110 S.E. 783, 785-786 (1922); *State v. Gentry*, 125 N.C. 733, 34 S.E. 706, 706-707 (1899); *State v. Rummage*, 19 N.C. App. 239, 193 S.E.2d 475 (1972).

[113]Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 299 (1971).

[114]*Furman v. Georgia, supra*, 408 U.S. at 242 (concurring opinion of Mr. Justice Douglas).

[115]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

ation – amounted largely to an indirect "dispensing power" of mercy:

> "... the distinction [between first and second degree murder] is much too vague to be continued in our law .... [t]he statute is framed along the lines of a defective and unreal psychology.... What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books. Upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death."[116]

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[116]CARDOZO, LAW AND LITERATURE 99-101 (1931). To speak of a "dispensing power," of course, is to describe only the benign half of what juries do when they "answer 'yes' or 'no' to the question whether this defendant was fit to live," *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968). A "yes" answer, "like the decision of the prosecutor to accept a plea of guilty in the plea-bargaining process, sounds good; somebody escapes death. The trouble is that if you turn the coin around, somebody else *suffers* death because the jury did *not* find him guilty of a lesser offense rather than of the capital charge. And if the jury's *milder* verdict may be a function of its sympathies, then its *sterner* verdict, by inevitable logic, may be a function of its *lack* of sympathy." BLACK, CAPITAL PUNISHMENT, THE INEVITA-

(continued)

We have already seen that the "privilege" described by Justice Cardozo "to find the lesser degree" must be afforded to the jury under North Carolina law when there is "any evidence, or ... any inference ... therefrom"[117] of an unpremeditated or a non-malicious killing, within the vague contours of those unilluminating terms. But even that is not the whole story of the trial judge's or the jury's discretion in regard to lessers. For in North Carolina, a jury may also be charged on a lesser included offense where there is *no* evidence to

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BILITY OF CAPRICE AND MISTAKE 47 (1974) (emphasis in original).

Although it seems superfluous to make this point after *Furman*, we may note that the oft-quoted passage in *Witherspoon v. Illinois, supra*, regarding the jury's function in maintaining "a link between contemporary community values and the penal system," 391 U.S. at 519 n.15, did not state or imply the propriety of a system under which different juries decided whether different defendants were fit to live or die according to the particular reflection of community values fortuitously mirrored by the particular jury. The *Witherspoon* passage rather carefully states that, *where a legislature has left the life-or-death sentencing choice to be made by juries without any guiding principles, preferences or standards*, the juries' function is to reflect community attitudes regarding the death penalty – with the consequence that the reflection may not be distorted by improper jury-selection practices. The "where" clause in this analysis is a description of Illinois law (not challenged in *Witherspoon*): it is not a prescription for desirable or constitutional jury performance.

[117]*State v. Knight*, 248 N.C. 384, 103 S.E.2d 452, 456 (1958), quoted more fully in note 97 *supra*.

support such a charge, and a conviction for the lesser offense will be sustained on appeal.[118] *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970); *State v. Robertson*, 210 N.C. 266, 186 S.E. 247 (1936); *State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917). In *State v. Matthews*, 142 N.C. 621, 55 S.E. 342 (1906), for example, the appellant, who had been convicted of second degree murder, claimed that an indictment for murder by poisoning necessarily implied that he was either guilty of first degree murder or innocent of any crime. The Court affirmed, stating that such a conviction was within the power of the jury, 55 S.E. at 343, and that "whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense." 55 S.E. at 344. In *State v. Quick*, 150 N.C. 820, 64 S.E. 168, 170 (1909), the Court held that the giving of a manslaughter charge in a first degree murder case had been proper:

> "[s]uppose the court erroneously submitted to the jury a view of the case not supported by evidence whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder,

[118] The Supreme Court of North Carolina has occasionally disapproved of this practice, *State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 114 (1972); *State v. Allen*, 279 N.C. 115, 181 S.E.2d 453, 457 (1971); *State v. Bentley*, 223 N.C. 563, 27 S.E.2d 738, 741 (1943), but it has never reversed a conviction of a lesser included offense on the ground that there was no evidence to justify submitting such an offense to the jury.

> what right has the defendant to complain? It is an error prejudicial to the state, and not to him."[119]

In *State v. Bentley*, 223 N.C. 563, 27 S.E.2d 738, 740 (1943), the Court declared:

> "[i]f we are to understand the appellant to base his demand for discharge merely on the fact that the jury by an act of grace has found him guilty of a minor offense, of which there is no evidence, instead of the more serious offense charged, this is to look a gift horse in the mouth; more especially, since the conclusion that there is no evidence must be reached by conceding that all the evidence, including the admission of the defendant, points to a graver crime. Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do, although illogical or even incongruous, since they are favorable to the accused, it is settled law that they will not be disturbed."

The jury has the further statutory power in felony cases to find a defendant guilty of either an attempt to commit the crime charged in the indictment or an assault with intent to commit that crime. North Carolina General Statutes § 15-170 (repl. vol. 1969) provides:

[119] "An error on the side of mercy is not reversible . . . ." *State v. Fowler*, 151 N.C. 731, 66 S.E. 567, 567 (1909). *Accord: State v. Rowe*, 155 N.C. 436, 71 S.E. 332, 337 (1911). *See also State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, 299-300 (1973); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461, 466 (1969); *State v. Johnson*, 218 N.C. 604, 12 S.E.2d 278, 288 (1940); *State v. Hall*, 214 N.C. 639, 200 S.E. 375, 377 (1939); *State v. Ratliff*, 199 N.C. 9, 153 S.E. 605, 606 (1930).

> "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein . . . or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

And N.C. Gen. Stat. § 15-169 (repl. vol. 1969) provides that:

> "[o]n the trial of any person for . . . any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such a finding . . . ."

Failure of the trial court to instruct the jury on attempt or assault may be reversible error. *State v. Williams*, 185 N.C. 685, 116 S.E. 736 (1923).[120]

Additional avenues for avoidance of a "mandatory" death penalty for first degree murder are provided by the power of North Carolina juries to allow a variety of indefinitely defined defenses, justifications and mitigations to the capital charge. These include the complete defenses of self-defense (or defense of others), *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 829 (1938), and insanity, *State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241, 256-257 (1969); provocation and passion, *State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 503

[120] *See also State v. Green*, 246 N.C. 717, 100 S.E.2d 52, 53-54 (1957); *State v. Roy*, 233 N.C. 558, 64 S.E.2d 840, 841 (1951); *State v. Webb*, 20 N.C. App. 199, 200 S.E.2d 840, 841 (1973). *Cf. State v. Bryant*, 280 N.C. 551, 187 S.E.2d 111, 116–118 (1972) (dissenting opinion of Mr. Chief Justice Bobbitt). "An assault with intent to commit rape is a lesser degree of the felony and crime of rape. It is well settled with us that an indictment for rape includes an assault with intent to commit rape." *State v. Green*, 246 N.C. 717, 100 S.E.2d 52, 54 (1957).

(1916); *State v. Johnson*, 23 N.C. 354, 359, 362 (1840); and "imperfect" self-defense, *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 836 (1922), which serve to reduce murder to manslaughter – doctrines of particular significance because "every practitioner, who has had any experience in the trial of capital cases, knows how prone juries are to compromise a capital case upon the middle ground of manslaughter," *State v. Brittain*, 89 N.C. 481, 501 (1883); and intoxication, which may avert at least a conviction of murder in the first degree, *State v. Hammonds*, 216 N.C. 67, 3 S.E.2d 439, 446-447 (1939). Each of these doctrines involves an "affirmative" defense which the jury may or may not choose to accept upon the evidence urged by the defendant to support it; each requires largely subjective judgments by jurors in the application of principles of the greatest vagueness and imprecision;[121] and the

[121] The contours of each North Carolina doctrine mentioned above are described in the following paragraphs, with the exception of insanity. Concerning the implications of the insanity defense as a means of avoiding capital punishment, see BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 50-55 (1974). North Carolina employs the traditional M'Naghten test of legal insanity, *State v. Humphrey*, 283 N.C. 570, 196 S.E.2d 516, 518-519 (1973), whose amorphousness is notorious, *see, e.g.*, GOLDSTEIN, THE INSANITY DEFENSE 44-66 (1967). And two ancillary North Carolina doctrines effectively consign the insanity defense to the complete discretion of the jury. First, the quantum of evidence suggesting mental abnormality which is ordinarily necessary to raise the issue for the jury's consideration is extremely small, *cf. State v. Atkinson*, 275 N.C. 288, 167 S.E.2d 241, 256–257 (1969), *rev'd on other grounds*, 403 U.S. 948 (1971); *State v. Harris*, 223 N.C. 697, 28 S.E.2d 232, 237 (1943), except, perhaps, where the nature of the testimony is not directed to the M'Naghten issue, *see State v. Helms*, 284 N.C. 508, 201 S.E.2d 850, 852-853 (1974). Second, the burden of proof upon the issue is the "satisfaction of the jury" test (*see* pp. 82-83 *infra*), and "[t]he jury alone is the judge of its satisfaction." *State v. Harris, supra*, 28 S.E.2d at 237-238.

peculiar North Carolina burden of proof on these issues – evidence "sufficient to satisfy" the jury – explicitly invites the making of those judgments in a wholly discretionary, non-objective manner.

> "[The North Carolina] cases enunciate and reiterate the rule – established in our law for over one hundred years, *State v. Willis*, 63 N.C. 26 (1868) – that when the burden rests upon an accused to establish an affirmative defense or to rebut the presumption of malice which the evidence has raised against him, the *quantum* of proof is to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – *but simply to the satisfaction of the jury*. Even proof by the greater weight of the evidence – a bare preponderance of the proof – may be sufficient to satisfy the jury, and the jury alone determines by what evidence it is satisfied."

State v. Freeman, 275 N.C. 662, 170 S.E.2d 461, 464 (1969) (emphasis in original).[122] "[T]he intensity of the

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[122]*See also State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 599-600 (1973); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235, 242 (1972); *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794, 797 (1971); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423, 428 (1971); *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328, 333 (1969); *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 158 (1965); *State v. Prince*, 223 N.C. 392, 26 S.E.2d 875, 876 (1943); *State v. Meares*, 222 N.C. 436, 23 S.E.2d 311, 312 (1942); *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922); *State v. Carland*, 90 N.C. 668, 674-675 (1884); *State v. Calloway*, 1 N.C. App. 150, 160 S.E.2d 501, 503 (1968); *State v. Richardson*, 14 N.C. App. 86, 187 S.E.2d 435, 437 (1972); *and see State v. Barrett*, 132 N.C. 1005, 43 S.E. 832, 833 (1903) (disapproving instructions that an affirmative defense must be established by the "greater proof" or "stronger proof").

> proof required to 'satisfy the jury' . . . cannot be defined by the court as being 'less than,' 'the same as,' or 'more than' the greater weight of the evidence or the preponderance of the evidence," STANSBURY, NORTH CAROLINA EVIDENCE § 214 (2d ed. 1963), because "the jury alone is the judge" of what satisfies it, *State v. Prince*, 223 N.C. 392, 265. E.2d 875, 876 (1943). Therefore, the " 'accepted formula *and the one that should be used if risk of error is to be avoided*, is that the defendant has the burden of proving his defense (or mitigation) "to the satisfaction of the jury – not by the greater weight of the evidence nor beyond a reasonable doubt – but simply to the satisfaction of the jury." ' " *State v. Freeman, supra*, 170 S.E.2d at 464 (quoting **STANSBURY**, *op. cit. supra* (emphasis in opinion)).
>
> The elements of which the jury must be thus "satisfied" are characteristically impressionistic. In assessing petitioner's claim of self-defense, for example, his trial jurors were called upon to decide whether, at the time of the incident with a man who had beaten him bloody that afternoon, petitioner had a "reasonable" apprehension of the necessity to kill in order to avoid suffering death or great bodily harm. *See State v. Watkins*, 283 N.C. 504, 196 S.E.2d 750, 754 (1973); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24, 27 (1968); *State v. Johnson*, 270 N.C. 215, 154 S.E.2d 48, 52 (1967); *State v. Fowler*, 250 N.C. 595, 108 S.E.2d 892, 894 (1959); *State v. Bryant*, 213 N.C. 752, 197 S.E. 530, 533 (1938); *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 828 (1938). The application of this principle in the context of a case where the defendant seeks to prove that a prior fight with the decedent was

resumed just before the killing obviously presents peculiar difficulties. *See State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910).

> "[O]ne may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief."

State v. Marshall, 208 N.C. 127, 179 S.E. 427, 428 (1935).[123] *See, e.g., State v. Gladden*, 279 N.C. 566, 184 S.E.2d 249, 253 (1971); *State v. Todd*, 264 N.C. 524, 142 S.E.2d 154, 159 (1965). However, the defendant must not have been the "aggressor," *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 601 (1973) – a notion apparently involving concepts of relative "fault"[124] – and he must have "used no more force

[123] The *Marshall* case is frequently cited as the leading modern exposition of the law of self-defense in North Carolina. A more recent summary is found in *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 600-601 (1973). *See also State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450-453 (1970); *State v. Kirby*, 273 N.C. 306, 160 S.E.2d 24, 26-29 (1968); *State v. Goode*, 249 N.C. 632, 107 S.E.2d 70, 71-72 (1959); *State v. Barrett*, 132 N.C. 1005, 43 S.E. 832, 832-835 (1903).

[124] The North Carolina cases abound with statements that, in order to prevail on a claim of self-defense, a defendant must have been "without fault" in provoking the assault against which he defends. *See, e.g., State v. Watkins* 283 N.C. 504, 196 S.E.2d 750, 755 (1973); *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423, 429-431 (1971); *State v. Wynn*, 278 N.C. 513, 180 S.E.2d 135, 139 (1971); *State v. Johnson*, 278 N.C. 252, 179 S.E.2d 429, 432 (1971); *State v. Davis*, 225 N.C. 117, 33 S.E.2d 623, 624

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than was or reasonably appeared necessary under the circumstances to protect himself from death or great bodily harm," *State v. Boyd*, 278 N.C. 682, 180 S.E.2d 794, 797 (1971). The use of "excessive force" defeats a claim of self-defense;[125] but one who uses excessive force may nevertheless prevail upon the partial defense of *imperfect* self-defense, which reduces murder – even by an intentional killing – to manslaughter, *State v. Rummage*, 280 N.C. 51, 185 S.E.2d 221, 225 (1971);

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(1945); *State v. Robinson*, 213 N.C. 273, 195 S.E. 824, 828-830 (1938); *State v. Blevins*, 138 N.C. 668, 50 S.E. 763, 764 (1905). In *State v. Crisp*, 170 N.C. 785, 87 S.E. 511 (1916), the North Carolina Supreme Court refined the fault concept (" 'a perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his actions,' " 87 S.E. at 514) by recognizing degrees of fault: if a defendant begins an affray with the intention of inflicting great bodily harm, his right of self-defense is lost and the killing is murder; but if he begins or provokes the affray with some lesser assault or verbal abuse, his right of self-defense is rendered "imperfect," *ibid.*, and he is guilty of manslaughter. The *Crisp* principle, turning the right of self-defense upon moral blame-worthiness, has deep roots in North Carolina law. *See, e.g., State v. Chavis*, 80 N.C. 353, 358 (1879); *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888).

[125] *State v. Jackson*, 284 N.C. 383, 200 S.E.2d 596, 601 (1973). *See also, e.g., State v. Benge*, 272 N.C. 261, 158 S.E.2d 70, 72 (1967); *State v. McDonald*, 249 N.C. 419, 106 S.E.2d 477, 478 (1959); *State v. Mosley*, 213 N.C. 304, 195 S.E. 830, 832 (1938); *State v. Terrell*, 212 N.C. 145, 193 S.E. 161, 164 (1937); *State v. Marshall*, 208 N.C. 127, 179 S.E. 427, 428 (1935); *State v. Glenn*, 198 N.C. 79, 150 S.E. 663, 664 (1929); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 422 (1910).

State v. Wynn, 278 N.C. 513, 180 S.E. 2d 135, 139 (1971); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305, 309 (1968); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617, 619 (1924); *State v. Cox*, 153 N.C. 638, 69 S.E. 419, 422 (1910). *See also State v. Woods*, 278 N.C. 210, 179 S.E.2d 358, 363 (1971); *State v. Kamey*, 273 N.C. 325, 160 S.E.2d 56, 59 (1968). Moreover, one who kills under the impulse of an *unreasonable* fear of death or serious bodily harm may also claim imperfect self-defense, reducing murder to manslaughter. *State v. Thomas*, 184 N.C. 757, 114 S.E. 834, 836-837 (1922);[126] *and see State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450 (1970).

Another partial defense that may result in a manslaughter verdict is provocation and passion. The North Carolina version of this doctrine is complex. Provocation alone (isolated from the passion that it may arouse) is held not to preclude malice but only to rebut the presumption of malice arising from an intentional killing with a deadly weapon. *State v.*

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[126]In addition to the "excessive force" and "unreasonable fear" varieties of imperfect self-defense, North Carolina law recognizes other situations in which a killing may be nonmalicious, and hence merely manslaughter, because the defendant's use of deadly force was self-protective although not legally justifiable under the doctrines pertaining to self-defense. *See State v. Finch*, 177 N.C. 599, 99 S.E. 409, 414 (1919); *State v. Yarborough*, 8 N.C. 78, 85 (1820). One such situation is the permutation of the "aggressor" doctrine described in note 124 *supra*. Another is the situation in which the defendant fails to comply with the "safe-retreat" requirement for perfect self-defense. *See State v. Garland*, 138 N.C. 675, 50 S.E. 853, 854-855 (1905); *cf. State v. Johnson*, 23 N.C. 354, 364 (1840).

Johnson, 23 N.C. 354, 359 (1840). Passion aroused by provocation, on the other hand, is said to be legally exclusive of malice: "[i]n law they cannot co-exist." *Id.* at 362. The psychological explanation offered by the early cases is that passion renders an individual heedless of the dictate of reason not to kill. *See State v. Hill*, 20 N.C. 491, 496 (1839); *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148, 151-152 (1910). But even from the outset the doctrine has been seen as an "indulgence of the law," *State v. Hill, supra*, 20 N.C. at 496, "a condescension to the frailty of the human frame," *ibid.* "In mitigating the offence to manslaughter where death ensues upon a sudden rencounter of this sort, the law shews its indulgence to that frailty of human nature which urges men, before they have an opportunity for reflection, to a compliance with those common notions of honour which forbid either to give way to, or acknowledge the superior prowess of, the other." *State v. Jarrott*, 23 N.C. 76, 85 (1840). *See also State v. Merrick*, 171 N.C. 788, 88 S.E. 501, 503 (1916). As might be expected of a moralistic conception of this nature, its rules are fine-spun and casuistic. The North Carolina Supreme Court has declared that " ' "passion" means any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection' . . . . 'Passion is not limited to rage, anger, or resentment. It may be fear, terror, or, according to some decisions, "excitement" or "nervousness," ' " *State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 450 (1970). Passion must spring from provocation, *State v. Carter*, 76 N.C. 20, 22-23 (1877); "slight" provocation is insufficient, *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888); *see*

State v. Keaton, 206 N.C. 682, 175 S.E. 296, 298 (1934); the provoking conduct must in theory "amount to an actual or threatened assault," *State v. Benson*, 183 N.C. 795, 111 S.E. 869, 871 (1922); *see also State v. Mosley*, 213 N.C. 304, 195 S.E. 830, 832-833 (1938).[127] North Carolina appellate courts have managed to remain within these rules with only a little straining;[128] but trial courts and juries have ignored them entirely.[129] Passion is sometimes said to be synonymous with "heat of blood," *State v. Jennings*, 276 N.C. 157, 171 S.E.2d 447, 449 (1970); *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305, 309 (1968); but then again it is said that " 'cool state of blood' does not mean the absence of passion and emotion . . . ." *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817, 822 (1974). The sum of the doctrine is to make murder or

[127]The provoking conduct need not, however, amount to a felonious assault, *State v. Will*, 18 N.C. 121, 169 (1834), and it need not have threatened the defendant's life, *State v. Sizemore*, 52 N.C. 206, 209 (1859).

[128]*See, e.g., State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910) (unlawful arrest by the victim who "shoved" the defendant held adequate provocation); *State v. Briggs*, 20 N.C. App. 368, 201 S.E.2d 580 (1974) (victim's actions of breaking defendant's car window and inserting the upper part of his body into the car held adequate provocation).

[129]*See, e.g., State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969) (victim threatened defendant, ran away, returned with his hand in his pocket; defendant who shot victim convicted of manslaughter); *State v. Phillips*, 262 N.C. 723, 138 S.E.2d 626 (1964) (victim opened door of car containing defendant and woman friend; defendant who shot victim convicted of manslaughter).

manslaughter liability depend essentially upon the jury's empathy with the defendant on trial:

> "reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion rather than judgment."

State v. Merrick, 171 N.C. 788, 88 S.E. 501, 503 (1916) (quoting *Maher v. People*, 10 Mich. 212, 220 (1862)).[130]

These several doctrines, of course, do not exhaust the non-capital options available to petitioner's jury. Jurors in his case or like cases, applying legal principles that leave the widest latitude for subjective judgment and the "natural human tendency to see facts and to evaluate evidence in a manner leading to a desired conclusion,"[131] might have returned verdicts ranging

[130]Provocation may also be held inadequate where the defendant's response is disproportionately severe. *State v. Ellis*, 101 N.C. 765, 7 S.E. 704, 705 (1888); *State v. Chavis*, 80 N.C. 353, 358 (1879); *State v. Curry*, 46 N.C. 280, 287 (1854). *Cf. State v. Gooch*, 94 N.C. 987, 1010 (1886).

[131]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 46 (1974).

from second degree murder[132] to acquittal,[133] in order

[132]Alcohol was implicated in petitioner's case (A. 14-15, 28-29, 52, 54), as it is in so many homicide cases. *See* WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 165-166, 323 (1966). Its involvement required consideration by the jury on the question of the premeditation and deliberation requisite for a capital, first degree murder conviction.

> "... [W]hether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. 'No inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law.' State v. Murphy, 157 N.C. 614, 619, 72 S.E. 1075, 1077. '[A] person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree.'"

State v. Hamby, 275 N.C. 674, 174 S.E.2d 385, 387 (1970). *See also State v. Duncan*, 282 N.C. 412, 193 S.E.2d 65, 69-70 (1972); *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526, 532-533 (1970); *State v. Propst*, 274 N.C. 62, 161 S.E.2d 560, 567-568 (1968); *State v. Arnold*, 264 N.C. 348, 141 S.E.2d 473, 474-475 (1965); *State v. Smith*, 221 N.C. 278, 20 S.E.2d 313, 321 (1942).

[133]Jury acquittals motivated solely to evade "mandatory" death sentences are an historical commonplace in the administration of "capital" justice. *See, e.g., State v. Fuller*, 114 N.C. 885, 19 S.E. 797, 802 (1894), quoted in text at pp. 67-68, *supra; State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896), quoted in note 107, *supra*; Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. Rev. 1009, 1102 n.18 (1953); Note, *The Two–Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50, 52 (1964); ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 2-3 (Center for Studies in Criminal Justice, 1968); Smith, *Capital Punishment*, 59 ALBANY L.J. 232, 241 (1899); Shipley, *Does Capital Punishment Prevent Convictions?* 43 AM. L. REV. 321 (1909).

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to avoid the death penalty. The inevitable propensity of

In *McGautha v. California*, 402 U.S. 183 (1971), this Court noted the "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers," *id.* at 198, and the fact that "jurors on occasion took the law into their own hands in [murder] cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of the capital offense," *id.* at 199. *See also Andres v. United States*, 333 U.S. 740, 753 (1948) (concurring opinion of Justice Frankfurter); KALVEN & ZEISEL, THE AMERICAN JURY 306-312 (1966); Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. REV. 32 (1974). *Cf.* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT ¶¶ 27-29 (H.M.S.O. 1953) [Cmd. 8932]; 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 154-160 (1948). "[B]y far the most pronounced argument in favor of ending mandatory death penalties, echoed on every side, was the extreme difficulty of obtaining convictions in cases where a conviction is tantamount to a death sentence." BEDAU, THE DEATH PENALTY IN AMERICA 27 (rev. ed. 1967). This fact is cited by scholars as a reason for a particular jurisdiction's shift from a mandatory to a discretionary system of death sentencing or for a decline in a jurisdiction's conviction rate. *See, e.g., The Death Penalty in the United States*, 9 GREENBAG 129 (1897) (New York); McCafferty, *Major Trends in the Use of Capital Punishment*, 25 FED. PROB. (No. 3) 15 (1961) (District of Columbia); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 28-31 (1965) (New Jersey); Phelps, *Rhode Island's Threat Against Murder*, 18 J. CRIM. L. & CRIM. 552 (1928) (Rhode Island); Bennett, *A Historic Move: Delaware Abolishes Capital Punishment*, 44 A.B.A.J. 1053 (1958), and

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any "mandatory" death-sentencing regime to produce this sort of selective evasion by juries is, of course, enhanced when the death penalty is made "mandatory" for a broad range of offenses including all first degree

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Bennett *Delaware Abolishes Capital Punishment*, 49 J. CRIM. L., CRIM. & POL. SCI. 156 (1958) (Delaware).

Cf. Wicker, "Christmas on the New Death Row," N. Y. Times, Dec. 25, 1973, at 18, col. 1:

> "Raleigh, N.C. Dec. 24 ... In January, 1973, the North Carolina Supreme Court ruled that the Federal Supreme Court had made it unconstitutional for a jury to recommend mercy, hence life imprisonment rather than death, for an arbitrary number of those convicted of first-degree murder, arson, rape or burglary; ... Around here, some are still heaving sighs of relief at the case of a black man charged with breaking into a house and stealing about $10 worth of food. The house was occupied, the break-in occurred at night, so the offense was first-degree burglary. Perhaps influenced by the only alternative available, the jury acquitted him, thus sparing him Christmas on the new Death Row but raising the question how mandatory death sentences can be considered an improvement on cruel and unusual punishment."

murders, rapes, first degree burglaries and arsons.[134] It is encouraged, and all but explicitly condoned, by the North Carolina Supreme Court's ruling – which appears to have no other purpose or effect than to invite the exercise of jury discretion – that capital jurors may be informed of the consequences of their supposedly "mandatory" verdict and its alternatives. *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974). There, the court held that if "the jury is confused or uncertain as to whether one of its permissive verdicts would result in a mandatory death sentence ... sufficient compelling reason exists to justify [the trial judge's] ... informing the jury of the consequences of their possible verdicts." 204 S.E.2d at 828. The court additionally ruled that "[c]ounsel may, in his argument to the jury, in any

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[134]Indeed, there is evidence that North Carolina adopted a discretionary form of capital sentencing in order to avoid unwarranted acquittals for these crimes by juries who did not want to see sympathetic defendants executed. In 1949, the Special Commission for the Improvement of the Administration of Justice in North Carolina reported that:

> "[o]nly three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, though guilty, should suffer death. The result is that verdicts are returned hardly in harmony with evidence. [A discretionary death penalty] ... is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases."

15 POPULAR GOVERNMENT 13 (January, 1949). A discretionary capital sentencing procedure was adopted shortly thereafter. *See also State v. McMillan*, 233 N.C. 630, 65 S.E.2d 212, 213 (1951).

case, read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. . . ." The defense attorney is not forbidden, "in his argument to the jury [to] . . . inform or remind the jury that the death penalty must be imposed in the event it should return a verdict of guilty upon a capital charge." *Id.* at 829.

The manner in which juries function in capital cases – particularly when they are told explicitly what is at stake – has been judicially noticed by the Supreme Court of North Carolina[135] and cannot realistically be ignored by this Court.[136] We venture to say that not a year passes when the certiorari process does not present a multitude of cases, rationally undifferentiable from petitioner's, in which a jury has returned a verdict of second degree murder or less. An altercation in a bar – a separation and renewed meeting of the combatants – some alcohol – a gun: the ingredients are tragically common. They form the backdrop of innumerable killings, crimes whose gravity no one can doubt, but which differing juries have immemorially treated as manslaughter, second degree murder, or first degree murder upon grounds that can only be described as inscrutable. The law reports of North Carolina are full of such cases where the verdict was less than first degree.[137] Spectroscopic color-matching of particular

[135] *State v. Locklear*, 118 N.C. 1154, 24 S.E. 410, 411 (1896), quoted in note 107 *supra; State v. Fuller*, 114 N.C. 885, 19 S.E. 797, 802 (1894), quoted in text at pp. 67-68, *supra; State v. Brittain*, 89 N.C. 481, 501 (1883), quoted in text at p. 81, *supra.*

[136] *Cf. Watts v. Indiana*, 338 U.S. 49, 52 (1949) (plurality opinion of Mr. Justice Frankfurter).

[137] We collect some of the cases in Appendix C, pp. 1c-4c *infra.*

cases with petitioner's undoubtedly discloses all of the more or less subtle differences of which the multifariousness of human existence is made. But it is impossible to read any number of these cases and deny the purely discretionary character of the jury judgments they reflect.

D. Executive Clemency

The North Carolina Constitution provides that:

> "[T]he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses (except in cases of impeachment), upon such conditions as he may think proper, subject to regulations prescribed by law relative to the manner of applying for pardons."

Article III, § 5(6). Governors of the State have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1903 and 1963, the sentences of 235 out of a total of 358 condemned prisoners were commuted.[138] The chief executive thus commuted 65.6% of North Carolina death sentences over a sixty year period.

The Governor's discretion to spare the lives of condemned felons is absolute. The Constitution reserves to the legislature only the right to prescribe the "manner of applying for pardons;" otherwise, the Governor may grant or deny clemency as he chooses, subject to "such conditions as he may think proper."

[138] Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 192 (1964). *See* notes 146, 147 *infra.*

The North Carolina Court of Appeals has said with regard to the analogous executive power to grant paroles (a power originally conferred upon the Governor by Article III) that:

> "[i]n a matter which historically, in this State at least, has been considered a function of the executive branch and which by its nature involves a large number of intangibles, rigid guide lines are neither necessary nor desirable."

Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, 792 (1971).

This conception of executive clemency is, of course, widespread; but it may be noted that the authority of the Governor of North Carolina in its exercise is less encumbered than that of the governors of many States. Several of the States which retain the death penalty have chosen to place some or all of the authority to make the clemency decision in the hands of a pardon board or executive council,[139] while others require periodic reports to legislative bodies on the exercise of executive clemency,[140] open hearings,[141] preparation of reasoned decisions on each application,[142] or, in certain kinds of cases, the advice of judicial authorities.[143] The

[139]*See, e.g.*, Conn. Gen. Stat. Rev. § 18-24a (1970); Idaho Const. art. 4, § 7; Utah Code Ann. § 77-62-2 (1968); Neb Const. art. 4, § 13.

[140]*See, e.g.*, N. Y. Const. art. 4, § 4; Ark. Code Ann. § 41-4714 (1973 supp.).

[141]*See, e.g.*, Idaho Const. art. 4 § 7; Neb. Const. art. 4, § 13; Pa. Const. art. 4, § 9.

[142]*See, e.g.*, Del. Const. art. 7, § 1; Utah Const. art. 7, § 12.

[143]*See* California Const. art 5, § 8 (1974 West cum. supp.).

North Carolina procedure requires none of these things.[144]

Under laws providing for a "mandatory" death penalty, grants of clemency have been considerably more frequent than under procedures giving juries explicit discretion to sentence convicted capital defendants to life or death. A 1957 study of the imposition of capital punishment in North Carolina noted a pronounced decline in the number of commutations of death sentences after the 1941 and 1949 statutory amendments which enabled juries to impose sentences of either life imprisonment or death for the four crimes that had theretofore carried "mandatory" death penalties.[145] A 1973 report on the history of the death

[144]North Carolina has, however, adopted the practice of announcing reasons for the grant, but not for the denial, of executive clemency. Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 158 (1964).

[145]Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165, 166-167 (1957). A study of the history of the death penalty in New Jersey also found evidence that clemency is afforded more frequently under a "mandatory" system than under a discretionary system. *See* Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (19 4). During the years when the death penalty was mandatory (1907-1915), there were 42 executions and 11 death sentences commuted, a ratio of 11/42 or 26.2%. *Id.* at 10. However, during the years 1916-1960, when a discretionary system of capital punishment was in effect, there were 115 executions and 22 commutations, for a ratio of 22/115 or 19.1%. *Ibid.*

penalty in the State found that while 64%[146] of condemned defendants escaped execution between 1910 and 1948, the percentage of those escaping execution dropped to 38% for the 1949-1962 period, when a discretionary death penalty was in effect for all "capital" crimes.[147]

The apparent explanation for this phenomenon is that in a "mandatory" system, the clemency authority undertakes to compensate for mitigating factors which, while insufficient to justify a verdict of not guilty, are nevertheless viewed by society as meriting some mercy in the imposition of sentence. Clemency serves "as a vehicle for the expression of society's compassion, as an outlet from the rigorous inflexibility of [the] . . . judicial system."[148] One study has noted:

> "[i]n a jurisdiction which provides for the sentence of death unless the jury recommends

[146]BEHRE, A BRIEF HISTORY OF CAPITAL PUNISHMENT IN NORTH CAROLINA, Tables 2 and 3 (N.C. Dept. of Corrections 1973). This 64% figure is slightly different from the commutation rate cited in the *N.Y.U. Law Review* study, p. 95 *supra*, because the years surveyed (1903-1963 in the *N.Y.U. Review* study; 1910-1948 in the Behre study) were not identical. Another study of executive clemency in North Carolina reveals that of the 304 death sentences imposed between July 1, 1938, and December 31, 1953, 229 were commuted by the Governor, for a 77.1% clemency rate during this period. Johnson, *supra* note 145, at 166.

[147] BEHRE, *op. cit. supra* note 146, at Tables 2 and 3.

[148]Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 38 (1965).

> mercy, the judge being bound by the jury's recommendation to impose a sentence, the clemency authority would normally refrain from reweighing the mitigating evidence presented at the trial. Obviously, the jury has here had the opportunity to assess extenuating circumstances apart from the issue of guilt. It is the belief of many that this function of the jury strips the clemency authority of much of its power in capital cases."[149]

If this observation is correct, the "mandatory" death penalty created by *State v. Waddell* is calculated to result in more frequent grants of executive clemency as the Governor effectively takes over where the jury leaves off. Not surprisingly, the clemency process will simply mirror the jury sentencing process condemned in *Furman*, with Governors granting or denying commutation according to standards that are unexplained, unreviewable, and changeable whenever different incumbents take office.[150]

[149]Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 165-166 (1964) (footnote omitted).

[150]*See* the studies cited in note 145 *supra*. A system which places uncontrolled powers of commutation in the hands of a single official is arbitrary by definition. It can also be demonstrated that such a system is likely to be discriminatory in effect. A comparison of the executed and the commuted among condemned prisoners in Pennsylvania between 1914 and 1958 revealed that "less than 15 percent of the death-row offenders with court-appointed counsel received commutation of sentence compared to over 25 percent of those offenders with private counsel" (this differential was characterized as statistically significant for black, but not for white defendants) and that "there is reason to suspect – and statistically significant evidence

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> "For clemency knows no standards that are invocable as a matter of law. To the saved, this is mercy, of a quality not strained. To those who learn they are to die, it is irrational choice for death – the final such choice in a long series."[151]

The various forms of arbitrary selectivity remaining in North Carolina's "mandatory" death penalty procedure thus insure that there will be no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. We do not suggest by the foregoing analysis that the selective discretion present at any of the separate stages of the criminal process would be constitutionally

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to support the suspicion – that Negroes have not received equal consideration for commutation of the death penalty." Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301, 309, 311 (1962).

A study of executive clemency in Illinois concluded:

> "[c]ertain troublesome patterns seem to suggest themselves from an analysis of the referent Illinois commutation cases. It seems that much depends upon mere luck! What kind of attorney happens to be appointed by the state? How zealous is he in delaying execution through legal maneuvers and in generating publicity and public pressure? Of what logical relevance to life and death is a public relations campaign?"

Lavinsky, *Executive Clemency: Study of a Decisional Problem Arising in the Terminal Stages of the Criminal Process*, 42 CHI.-KENT L. REV. 13, 39 (1965).

[151]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 74 (1974).

objectionable in a non-capital case[152] or even that any one form of discretion would necessarily be enough to invalidate a death penalty under the Eighth Amendment. But the arbitrariness of the entire procedural system is cumulative; and the gauntlet which a capitally charged defendant must now run is fully as unpredictable – its results equally capricious – as under the pre-*Furman*, pre-*Waddell* system. At no point in the process is a visible and deliberative life-death choice required; yet the inevitable discretionary decisions can only be more freakish and wanton inasmuch as they are disguised and more diffused. This deadly lottery brings petitioner's death sentence to the heart of the historic concerns of the Eighth Amendment as recognized in *Furman*.

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[152]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 33 (1974):

> "[o]ur legal system is simply saturated, at all levels, with the ideas that requirements of fairness, certainty, and so on – all the things we mean when we say 'due process of law' – vary with the seriousness of the interest at stake, and that, as a corollary, imposition of the penalty of death carries with it a more exacting requirement than other punitive action of the political society."

Cf. Bell v. Burson, 402 U.S. 535, 540 (1971); *Stanley v. Illinois*, 405 U.S. 645, 650-651 (1972). *See also* pp. 115-117 *infra*.

III.

THE EXCESSIVE CRUELTY OF DEATH

There are additional reasons why the death penalty reinstated by *Waddell* violates the essential guarantees of the Eighth and Fourteenth Amendments. These reasons are interrelated in the prevailing *Furman* opinions, and we treat them together here. Essentially, *Furman* reviewed the history of this country's use of the punishment of death and concluded that, although the extreme penalty was then authorized by law in forty-one American States (and by the federal government and the District of Columbia), it was in fact so rarely and so arbitrarily inflicted under discretionary sentencing procedures that it constituted a cruel and unusual punishment. This was so because the occasional and virtually random extinction of human life was a cruelty compounded by inequity, and because the very randomness and rarity of the punishment belied any claim that it fulfilled an accepted or acceptable penal purpose.

In Part II of this brief, we have demonstrated that the use of the death penalty remains arbitrary, random and occasional under North Carolina's post-*Furman*, purportedly "mandatory" system of capital sentencing because that system provides numerous mechanisms which express and implement the unwillingness of prosecutors, judges, juries and the Governor to accept a general, uniform and even-handed application of the penalty. These mechanisms and their use continue to be the means by which a punishment incapable of general

or substantial application is reserved for visitation on a mute and disfavored few. That sort of application of a penalty is one of the hallmarks of a cruel and unusual punishment in the Eighth Amendment sense. In this Part III, we examine the several relevant hallmarks and submit that they collectively condemn the penalty of death. Such an examination should, however, begin with consideration of the proper standards of judicial review of a penalty challenged under the Eighth Amendment.

A. The Standard of Judicial Review

We start with the "elementary" truth[153] that legislative authorization of a punishment does not establish its conformity to Eighth Amendment principles of decency.[154] If this were otherwise, the Eighth Amendment would be "little more than good advice" from the Founding Fathers to future legislators. *Trop v. Dulles*, 356 U.S. 86, 104 (1958) (plurality opinion of

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[153] *Weems v. United States*, 217 U.S. 349, 379 (1910).

[154] *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion of Chief Justice Warren):

> "[w]e are oath-bound to defend the Constitution. This obligation requires that [legislative] ... enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."

Chief Justice Warren.)[155] "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

This basic postulate is the source of the most delicate problem of Eighth Amendment adjudication: striking the balance between respect for the primary legislative power to define crimes and fix sanctions[156] and the diligence commanded by the constitutional role of the judiciary to protect and preserve the Constitution's

[155]George Mason, who drafted the 1776 Virginia Declaration of Rights, *see* note 56 *supra*, which contained a prohibition of cruel and unusual punishments that was almost identical to that of Clause 10 of the English Bill of Rights of 1689 and to the Eighth Amendment, declared in the Virginia ratifying convention that it was necessary to limit the arbitrary punishing power of all branches of government. *See* pp. 38-39 *supra*. Patrick Henry strongly agreed that Congress should not be allowed to "define punishments without this control." 3 ELLIOT'S DEBATES 447 (2d ed. 1863). *See* note 55 *supra*.

[156]In this litigation we deal, of course, with a decision to maintain capital punishment that was made by a bare majority of the North Carolina Supreme Court through the application of state-law severability doctrines to a state statute. Nevertheless, that decision speaks with the voice of North Carolina for federal constitutional purposes. *See Winters v. New York*, 333 U.S. 507, 512-515 (1948); *Cohen v. California*, 403 U.S. 15, 23-24 n.5 (1971).

guarantees of individual rights against governmental – that is, necessarily, majoritarian – overreaching.[157] The inescapable tension and its resolution were described with as much precision as the subject permits in *Weems v. United States*, 217 U.S. 349, 378-379 (1910):

> "... prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such cases, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, – that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by

[157]*Furman v. Georgia*, *supra*, 408 U.S. at 431 (dissenting opinion of Mr. Justice Powell) (citing *Blodgett v. Holden*, 275 U.S. 142, 147-148 (1927) (concurring opinion)):

> "[t]he review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized most appropriately by Mr. Justice Holmes as 'the gravest and most delicate duty that the Court is called on to perform.'"

> presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitations, we repeat, but constitutional ones, and what those are the judiciary must judge."

Thus, although a fitting deference to legislative will and to the autonomy of the States is always required, this Court bears the responsibility, placed exclusively upon it in the last analysis, to define and uphold the specific limitations which a written Constitution has erected as the boundaries beyond which no action or decision of American government may go.[158]

There are circumstances under which the danger is particularly great that legislative judgment will not duly heed the constitutional rights of individuals. Here judicial scrutiny of legislation ought to be commensurately exacting. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). This is most frequently the case where statutes fall harshly only upon "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938),

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[158] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958):

> "[i]n 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

See also United States v. Nixon, ____ U.S. ____, 94 S.Ct. 3090, 3106 (1974).

and where their operation takes a form that "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation," *id.* at 152 n.4. It is especially the case where cruel criminal punishments are applied to a very few: that is, in circumstances where the Eighth Amendment may be colorably invoked. And in the present case, additional considerations arising from the unique nature of the punishment of death require an uniquely stringent standard of judicial review under "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles, supra*, 356 U.S., at 101.

First, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100. The Amendment stands to assure that respect for individual human life and dignity restricts the state's responses to even the most culpable criminal conduct. Yet the decision to use capital punishment on a man implies a judgment that his dignity and worth may be denied absolutely, that his " 'life ceases to be sacred when it is thought useful to kill him.' "[159] Such a judgment deliberately to extinguish human life[160] –

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[159] Francart, quoted by Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 176 (Mod. Lib. 1963).

[160] "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have rights.' " *Furman v. Georgia, supra*, 408 U.S. at 290 (concurring opinion of Mr. Justice Brennan).

to employ a sanction that necessarily denies the very value upon which the Eighth Amendment rests – imperatively calls upon "the obligations [of] . . . the judiciary to judge the constitutionality of punishment" from an independent perspective. *Furman v. Georgia, supra,* 408 U.S. at 313-314 (concurring opinion of Mr. Justice White).

Second, the death penalty bears an awesome and irrevocable finality[161] incomparable with other punishments.[162] This Court has said of sterilization that "[t]here is no redemption for the individual whom the law touches." *Skinner v. Oklahoma ex rel. Williamson, supra,* 316 U.S. at 541. That is *literally* true of capital punishment. No eloquence can embellish, nor human mind entirely conceive, death's utter irreversibility.[163] New

[161]"Capital punishment is an evil, unless justified [because] . . . it extinguishes, after untellable suffering, the most mysterious and wonderful thing we know, human life." Black, *Crisis in Capital Punishment*, 31 MD. L. REV. 289, 291 (1971).

[162]Thus, the declaration of Lafayette that infliction of the death penalty should be suspended "until . . . the infallibility of human judgment is demonstrated." Quoted in Pollak, *The Errors of Justice*, 284 ANNALS 115 (1952), and CLARK, CRIME IN AMERICA 334 (1970). The quotation has also been attributed to Jefferson. *See* BLOCK, AND MAY GOD HAVE MERCY . . . 1 (1962). *See also* Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 CRIME & DELINQ. 121, 130-131 (1969).

[163]"Human justice can never be infallible. No matter how conscientiously courts operate, there still exists a possibility that an innocent person may, due to a combination of circumstances that defeat justice, be sentenced to death and even executed. That possibility is made abundantly clear when one considers the many instances in which innocent persons have been saved from the extreme penalty either by the last minute discovery of new evidence or by a commutation followed perhaps after many years in prison by the discovery of the real criminal."

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knowledge, second thought, calmer passions, lessons of experience – every known corrective for the inevitable errors of judgment in penological, political, and constitutional experimentation comes too late.[164]

Third, any balancing process which sets out to weigh the penalty of death in the pans of the Eighth Amendment must begin with the proposition that capital punishment is self-evidently cruel within every meaning of that word which a civilized, Twentieth-Century society can accept.[165] We do not deal here with a punishment that can be considered cruel only in relation to the conduct that it is used to regulate, *cf. Robinson v. California,* 370 U.S. 660, 667 (1962) –

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SELLIN, THE DEATH PENALTY, 63 (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959). *See also* Hogan, *Murder by Perjury*, 30 FORDHAM L. REV. 285 (1961); BORCHARD, CONVICTING THE INNOCENT 294-303, 309-316 (1932); Gardner, *Helping the Innocent*, 17 U.C.L.A. L. REV. 535 (1970).

[164]"[D]eath is different . . . it is irrevocable in quite a distinct sense from the general irrevocability of all happenings. If a mistake of any kind is discovered, it is too late. In every way and for every purpose, it is too late." BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 32 (1974).

[165]The evolutionary character of Eighth Amendment standards no longer needs argument. The Clause is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). *See also Furman v. Georgia, supra*, 408 U.S. at 242 (concurring opinion of Mr. Justice Douglas; *id.* at 264-269 (concurring opinion of Mr. Justice Brennan); *id.* at 325-328 (concurring opinion of Mr. Justice Marshall); *id.* at 383 (dissenting opinion of Chief Justice Burger); *id.* at 409 (dissenting opinion of Mr. Justice Blackmun); *id.* at 429 (dissenting opinion of Mr. Justice Powell.)

cruel in "consideration of the mischief and the remedy", *Weems v. United States, supra*, 217 U.S. at 373.[166]

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual in the constitutional sense because it was thought justified by the social ends it was deemed to serve."

Furman v. Georgia, supra, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

It is not an overstatement to describe confinement under sentence of death as exquisite psychological

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[166]Nevertheless, Camus' point deserves note:

> "[In considering the argument from *lex talionis*] let us leave aside the fact that the law of retaliation is inapplicable and that it would seem just as excessive to punish the incendiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft. Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be an equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life."
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> Camus, *Reflections on the Guillotine*, in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 151-152 (Mod. Lib. 1963).

torture. *See People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880, 894 (1972). With the commendable motive – and under the inescapable obligation – of striving to avoid erroneous or illegal executions, Twentieth-Century American justice has prolonged that torture. Of 608 persons under sentence of death at the end of 1970, 302 had been on Death Row for more than three years, 165 for more than five years, 81 for more than seven years, and 67 for more than eight years.[167] "[C]ontemporary human knowledge"[168] of the nature of suffering and its effects upon the human mind teaches that over such extended periods the familiar manifestations of immediate terror cease as the extraordinary anxiety and pain of condemnation find other outlets. Anguish can no longer be conceived as some enormous multiple of the pain of a broken bone or a crushed fingernail, because human beings cannot tolerate many such multiplications without severe personality distortions such as the denial of reality.[169] The effects of these coping mechanisms observed in Death Row prisoners are acute;[170] the alternative is emotional

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[167]UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 42 (August, 1971).

[168]*Robinson v. California*, 370 U.S. 660, 666 (1972).

[169]*See*, Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 827 (1972).

[170]*See* Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962).

breakdown.[171]

The torture is perhaps more nearly comprehensible in the words of those who have suffered it:

> "My feeling toward being on death row is unlimited. I can go on and on telling you the different feelings I experience being on Death Row. But I'm going to make it brief, because I can take the 68,634,000 square miles of the Pacific Ocean and put it into ink, and take all the trees in America and put them into pencils and paper, and still, it won't be enough material to express my feeling towards being on death row. My feeling being on death row is like no tomorrow. When I go into deep meditation, I can see life and feel the freedom that the universe has to offer, but when I come out of it, it's like being in the middle of a nightmare. So you can see why my thoughts has no end.

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[171]An evaluation of eight North Carolina death row inmates revealed that three, or thirty-five percent, had made "relatively poor adjustments, with obvious deterioration." Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSYCHIATRY 81, 82, 1972. One of these had developed a complex delusional system; another became increasingly self-destructive and a third was constantly under medication "with varying degrees of unsustained relief" and was once hospitalized for drug overdose. *Id.* at 82-83. *See also* West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125, 127 (G.P.O. 1970); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972); *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (dissenting opinion of Justice Frankfurter).

> I feel as tho the world is caving in on me."[172]

The physical and psychological pain of execution itself – whether life is destroyed by gas, by electrocution, or by other means – is, of course, unmeasurable.[173] It is

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[172]Coley, *A Letter from Death Row*, 3 JURIS DOCTOR 19 (Dec. 1973). *Cf.* DOSTOEVSKY, THE IDIOT 20 (Mod. Lib. 1935). *See generally* LEVINE (ed.), DEATH ROW–AN AFFIRMATION OF LIFE (1972); CHESSMAN, TRIAL BY ORDEAL 3 (1955):

> "I've witnessed the disintegration of the minds of the men around me. I've seen these men naked on the floor, rolling in their own excrement. I've listened as they smashed and shattered the sinks and toilets and fixtures in their cells. I've heard their prayers and their screams and their curses. I've observed their bodies being removed after they had destroyed themselves. I've read their pathetic pleas for mercy."

[173]All medical witnesses agree that it takes a few seconds for the condemned man to lose consciousness after inhaling lethal gas. *See* Hamer, *The Execution of Robert H. White by Hydrocyanic Acid Gas*, 95 J. AM. MED. ASSN. 661 (1930); Rosenbloom, *Report of a Case of Chronic Hydrocyanic Acid Poisoning*, 8 J. LAB. & CLIN. MED. 258 (1923); ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 251-256 (H.M.S.O. 1953) [Cmd. 8932]. Other scientists assert that the condemned man is conscious for a longer time and dies by slow agonizing strangulation. KEVORKIAN, MEDICAL RESEARCH AND THE DEATH PENALTY 18-19 (1960). *See also* Schmitt & Schmitt, *The Nature of the Nerve Impulse: The Effect of Cyanides Upon Medullated Nerves* (Pt. 2), 97 AM. J. PHYSIOLOGY 302, 302-304 (1931). *Cf.* DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 102-103 (1962):

> "[t]he warden gives the executioner the signal and, out of sight of the witnesses, the executioner presses the lever that allows the cyanide gas eggs to mix with the distilled water

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one of the questions to which capital punishment cuts off an answer, leaving only such scant comfort or nagging doubt as speculation may provide. "Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death." *Furman v. Georgia, supra,* 408 U.S. at 287 (concurring opinion of Mr. Justice Brennan). Here again, the ordinary deference due to legislative judgment encounters the objection that legislators, in common with all other men, simply *cannot* know significant facts on which advised, dispassionate judgment ought to turn at least in part. The decision to kill a human being is intractably a decision to do an act whose most immediate major consequences are unknowable. No amount of legislative inquiries or knowledge can close up that gap (*compare, e.g., McGinnis v. Royster,* 410 U.S. 263 (1973)), and all a legislature's "groping efforts" at experimenting with the penalty of death (*compare, e.g., Tigner v. Texas,* 310 U.S. 141, 148 (1940)) will not provide its members or mankind more information on the subject.

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> and sulphuric acid. In a matter of seconds the prisoner is unconscious. At first there is extreme evidence of horror, pain, strangling. The eyes pop, they turn purple, they drool. It is a horrible sight. Witnesses faint. It finally is as though he has gone to sleep. The body, however, is not disfigured or mutilated in any way."

Evidence regarding the experience of electrocution is similarly inconclusive. A French scientist, Dr. L. G. V. Rota, has said "I do not believe that anyone killed by electrocution dies instantly, no matter how weak the subject may be." Quoted in SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 219 (1950).

Fourth, the compatibility of the death penalty with Eighth Amendment values is called into question by its *de jure* or *de facto* abandonment among civilized nations.[174] Capital punishment has been abolished by most of the countries of Western Europe and the Western Hemisphere,[175] and is now in virtual disuse throughout the world.[176] A penalty thus progressively repudiated on a world-wide scale surely warrants close and critical examination when tested by the constitutional standards of decency of a Nation whose citizens would be widely appalled to believe it laggard in the enlightened administration of justice.[177]

Fifth, long-standing traditions defining the judicial role in capital cases recognize the need for close

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[174]Despite a wave of terrorist bombings in 1974, the British House of Commons decisively rejected a measure to reinstitute the death penalty in Great Britian for terrorist murders. N.Y. Times, Dec. 12, 1974, at 7, col. 1.

[175]An analysis of world-wide trends in the authorization and use of the penalty of death is contained in Appendix D, pp. 1d - 6d *infra.*

[176]"Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority." UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) 3 (February 23, 1971).

[177]In declaring denationalization a cruel and unusual punishment, the Court relied in part upon the fact that "[t]he civilized nations of the world [were] . . . in virtual unanimity that statelessness is not to be imposed as punishment for crime." *Trop. v. Dulles, supra,* 356 U.S. at 102.

scrutiny of the punishment of death. The principle of strict construction *in favorem vitae* runs deep in Anglo-American history,[178] and is only one exemplification of the special safeguards that apply in legal proceedings when life is at stake:

> "[a]ll the state legal systems in one way or another – by requiring jury unanimity, by forbidding pleas of guilty to a capital offense, by providing for automatic appeals, and so on – have recognized this distinction, quite without compulsion from the national Supreme Court. But when such compulsion was needed it has been forthcoming. For many years our federal Supreme Court required of the states that they invariably assign counsel in capital cases, while leaving the question of counsel in noncapital cases open to variation based on special circumstances; the fact that at last the Court decided counsel should be required in all serious criminal cases does not impair the force of the earlier cases as establishing national recognition of the immense difference between imprisonment and death. On the other side of the coin, the Supreme Court has several times upheld, as not violating any federal guarantee, state laws imposing more stringent requirements for trial in capital cases than in other cases."[179]

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[178]*See* 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 83-106 (1948).

[179]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 34 (1974). Profesessor Black refers, of course, to the evolution from *Powell v. Alabama*, 278 U.S. 45 (1932), through *Betts v. Brady*, 316 U.S. 455 (1942), to *Gideon v. Wainwright*, 372 U.S. 335 (1963); and to such cases as *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Review of procedural issues in death cases has been pursued under a policy of resolving legal "doubts . . . in favor of the accused,"[180] and capital convictions generally have been scrutinized on appeal with an avowedly strict eye for error.[181] At a time when the other considerations we have enumerated raise the question of the continuing constitutional validity of the death penalty itself, it is appropriate that the same strict scrutiny be turned upon that question.

Finally, in suggesting that sort of scrutiny, we ask no more of the Court than society itself demands. Other punishments – even punishments of extreme severity – are and have long been accepted without the extraordinary controversy, the collective soul-searching, and the parade of elaborate justifications and rationalizations that have accompanied the peculiar institution of capital punishment. Despite the relatively minuscule number of its victims[182] the justifiability of the death penalty has been the subject of continuing and heated

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[180]*Andres v. United States*, 333 U.S. 740, 752 (1948). *See also. e.g., Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (concurring opinion of Justice Frankfurter); *id*. at 77 (concurring opinion of Justice Harlan).

[181]Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 659 (1974), and authorities cited.

[182]In 1970 nearly 80,000 persons were admitted to state and federal adult correctional facilities, only 127 of whom were under sentence of death. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 358, 465 (August 1973).

debate[183] in religious, academic, legislative and law enforcement circles and among the general public. It is surely the case that "[a]t the very least . . . contemporary society views this punishment with substantial doubt." *Furman v. Georgia, supra,* 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

The moral character of this debate is as significant as its prevalence. The opposition to capital punishment – frequently voiced by religious denominations,[184] among others – has been vigorously asserted on the basis of "fundamental moral and societal values in our civiliza-

[183]The arguments for and against capital punishment have been frequently catalogued. *See. e.g.,* Vialet, *Capital Punishment: Pro and Con Arguments* (United States, Library of Congress, Legislative Reference Service, mimeo, August 3, 1966), reprinted *in Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 172-200 (G.P.O. 1970); BEDAU, THE DEATH PENALTY IN AMERICA 120-123 (rev. ed. 1967); 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 1350-1363 (G.P.O. 1970). *See* notes 184-186 *infra.*

[184]For a description of the positions taken by various religious groups in opposition to capital punishment, see Bedau, *The Issue of Capital Punishment*, 53 CURRENT HISTORY No. 312 82, 84-85 August 1967).

tion and in our society."[185] Proponents of the death penalty have responded with equal moral fervor.[186] Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument.

[185]Canadian Prime Minister Lester B. Pearson, addressing the House of Commons in support of a bill restricting the death penalty for murder in Canada. CANADA, HOUSE OF COMMONS, IV DEBATES, 27th Parl., 2d Sess. (16 Eliz. II) 4370 (Nov. 16, 1967). For similar expressions, *see, e.g.*, Kazis, *Jewish Tradition and Capital Punishment*, 6 TRENDS 6 (Nov.-Dec. 1973); Editorial, *Genesis and Capital Punishment.* 66 CHRISTIAN CENTURY 355 (March 28, 1973); *Controversy Over Capital Punishment: Pro & Con*, 52 CONG. DIGEST 1, 10, 12, 16, 20, 26 (1974); National Council on Crime and Delinquency *Policy Statement on Capital Punishment*, 10 CRIME & DELINQ. 105 (1964); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROB. No. 2 11 (1964); Milligan, *A Protestant's View of the Death Penalty*, in BEDAU, THE DEATH PENALTY IN AMERICA 175 (rev. ed. 1967); Ehrmann, *For Whom the Chair Waits*, 26 FED. PROB. No. 1 14 (1962); BOK, STAR WORMWOOD (1959); CALVERT, CAPITAL PUNISHMENT IN THE TWENTIETH CENTURY (1927); GOWERS, A LIFE FOR A LIFE (1956); KOESTLER, REFLECTIONS ON HANGING (Amer. ed. 1957)

[186]*See, e.g.,* Vellenga, *Christianity and the Death Penalty*, 6 CHRISTIANITY TODAY 7 (Oct. 12, 1959); Hon. Samuel Leibowitz, in *Symposium on Capital Punishment,* 7 N.Y.L.F. 249, 289-296 (1961); *Controversy Over Capital Punishment: Pro & Con*, 52 CONG. DIGEST 1, 11, 13, 15, 21, 25 (1974); Kinney, *In Defense of Capital Punishment*, 54 KY. L. J. 742 (1966); McDermott, *Some Crimes Demand the Death Penalty*, 11 POLICE 4 (Mar.-April, 1967); Caldwell, *Why Is the Death Penalty Retained?* 284 ANNALS 45 (1952); Coakley, *Capital Punishment*, 1 AM. CRIM. L. Q. 27 (1963); Cohen, *The Need for Capital Punishment,* 20 CHITTY'S L.J. 86 (1972); Hook, *The Death Sentence*, in BEDAU, THE DEATH PENALTY IN AMERICA 146 (rev. ed. 1967); Barzun, *In Favor of Capital Punishment,* 31 AM. SCHOLAR 181 (1962).

Agonizings of this sort that can neither be resolved nor stilled suggest a widespread perception that there is something fundamentally questionable about the penalty of death. In view of the extreme infrequency of its use, the troubled concerns which the punishment invariably arouses can only be explained by its uniquely and profoundly problematic aspects: its dissonance with the basic values of our society. For reasons to which we shall return – reasons having to do primarily with the rarity and secrecy of the actual use of the death penalty and with the outcast character of those subjected to it[187] – the problematic aspects of capital punishment have not stayed state and federal legislatures from enacting it. But those aspects particularly warrant independent and stringent examination of the death penalty by this Court at a moment when the Nation, which has not executed a man or woman for seven and a half years, agonizes once again upon the brink.

Such an examination requires that the Court determine whether the manifest cruelty of taking human life is or is not "justified by the social ends it [is] . . . deemed to serve."[188] Because of the unique character of the death penalty,[189] those justifications must be real and substantial;[190] and they must conform

[187] *See* pp. 134 - 139, *infra.*

[188] *Furman v. Georgia, supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[189] *See* pp. 107 - 120 *supra.*

[190] *Cf. N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-308 (1964) (involving the right of association). *See also Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

to the fashion in which the penalty is applied in fact.[191] If "less drastic means for achieving the same basic purpose"[192] are available, the State must use them rather than indulge in the "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes."[193] This much is implied in "the duty of [the] . . . Court to determine whether the action [of killing people] bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification,"[194] or whether, conversely, the punishment of death is excessive[195] and therefore unconstitutional.

B. THE JUSTIFIABILITY OF THE PENALTY OF DEATH

Criminal punishments are traditionally justified by five related but separable objectives: reformation and

[191] *Cf. Edwards v. South Carolina*, 372 U.S. 229, 236-237 (1963) (involving the right of free speech). *See also e.g., Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *Carrington v. Rash*, 380 U.S. 89, 94-96 (1965).

[192] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (involving the right of association).

[193] *Furman v. Georgia, supra*, 408 U.S. at 312 (concurring opinion of Mr. Justice White).

[194] *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) (involving the right of association).

[195] *Furman v. Georgia, supra*, 408 U.S. at 279-280, 300-305 (concurring opinion of Mr. Justice Brennan); *id.* at 309 (concurring opinion of Mr. Justice Stewart); *id.* at 312-313 (concurring opinion of Mr. Justice White); *id.* at 331-332, 342-359 (concurring opinion of Mr. Justice Marshall).

rehabilitation, moral reinforcement or reprobation, isolation or specific deterrence, retribution, and deterrence. It is not enough, however, that the death penalty simply implement one or more of these goals. It must be demonstrated that this uniquely harsh punishment is better fitted to the effectuation of the permissible purposes of the criminal law than other kinds of available criminal penalties.

Of the first two of these objectives, little need be said. Clearly "reformation . . . can have no application where the death penalty is exacted."[196] The imposition and execution of a death sentence are not designed to serve as instruments for the redemption of criminal offenders: to the contrary, they represent a determination that the offender is unredeemable.[197] Similarly, the moral reinforcement or reprobation function provides no substantial justification for the unique harshness of the death penalty.[198] While this

[196]ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 18 (H.M.S.O. 1953) [Cmd. 8932]. *See also* SELLIN, THE DEATH PENALTY 69-79 (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959); KOESTLER, REFLECTIONS ON HANGING 144-152 (Amer. ed. 1957); BEDAU, THE DEATH PENALTY IN AMERICA 395-405 (rev. ed. 1967); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 47 (1964).

[197]*Cf.* Stephen, *Capital Punishment*, 69 FRASER'S MAGAZINE 753, 763 (1864): "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world. Take your chance elsewhere.' "

[198]*See* Ancel, *The Problem of the Death Penalty*, in SELLIN, CAPITAL PUNISHMENT 3, 16-17, 19 (1967).

objective doubtless requires that the most serious crimes be punished most seriously, "[g]rading punishments according to the severity of the crime does not require that the upper limit of severity be the death penalty."[199] This objective contains no commensurability standard whereby the relative efficacy of the death penalty and life imprisonment can be judged. A severe punishment of any kind enforces equally the restraints of the criminal law.

While the death penalty may have once been necessary to control dangerous criminals, the development of a penitentiary system in the Nineteenth Century has provided an alternative means of containing such persons.[200] Moreover, there is evidence that

[199]BEDAU, THE DEATH PENALTY IN AMERICA 268 (rev. ed. 1967).

[200]*See* Bedau, *The Courts, The Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 232:

> "[i]n 1790, when the eighth amendment was adopted (and even more so in earlier centuries, when 'cruel and unusual punishments' were first prohibited in England) only two types of punishment were available to cope with serious offenses: death (with or without aggravations) and banishment, or 'transportation,' to the colonies or some other remote and relatively uninhabited region. Imprisonment, as something more than a mode of temporary detention prior to trial or as punishment for a minor offense, was entirely unknown at the time anywhere in Europe or America. How could anyone in 1790 sensibly have demanded that the 'evolving standards of decency' required there and then imprisonment rather than death for felons? There were no prisons, no trained custodial and administrative officers, no parole system, no statutes to authorize creating any of these, no public disposition to obtain them – in short, none of the attitudes, facilities and

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convicted murderers are less likely to engage in future criminal behavior than are other classes of offenders.[201] The execution of criminal defendants to insure their

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> personnel obviously necessary to run a system of long term incarceration. Today, of course, banishment is no alternative at all. Instead, imprisonment is an entirely commonplace practice and a viable alternative to banishment and death for every serious crime. However inhumane and brutal imprisonment may be (and there is no doubt that in practice it often is), involuntary incarceration under close supervision may still be a *necessary* 'cruelty' in most cases involving the commission of violent crimes. The undeniably greater severity of death as a punishment over imprisonment is, *ceteris paribus*, sufficient by itself to establish its greater cruelty."

There are now in this country, 4,401 state, federal and local correctional facilities employing more than 70,000 people. UNITED STATES DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 108-109 (August 1973).

[201] A study of parole violation found that "[t]he percentage of Willful Homicide violators returned to prison on new commitments . . . [was], with one exception (Alcohol Laws Violations), the lowest in any offender group." Neithercutt, *Parole Violation Patterns and Commitment Offense*, 9 J. RESEARCH CRIME & DELINQ. 87, 90 (1972). The murderer has also been found to have "a lower 'criminality level' than the non-murderer [while] in the prison population." Waldo, *The "Criminality Level" of Incarcerated Murderers and Non-Murderers* 60 J. CRIM L., CRIM. & POL. SCI. 60, 70 (1970). Of twenty-six homicides committed in American prisons in 1964, only two were committed by inmates serving sentences for capital murder. Sellin, *Homicides and Assaults in American Prisons, 1964*, 31 ACTA CRIMINOLOGIAE ET MEDICINAE LEGALIS JAPONICA 139 (1965).

effective isolation from society is an excessive punishment since less drastic means now exist to protect society (and are customarily used, for example, to constrain homicide defendants whose mental condition renders them incompetent to stand trial). Although the death penalty effectuates the goal of isolation of offenders, it is an unnecessarily harsh mechanism for obtaining this result.

The fourth traditional goal of criminal punishments is retribution, the achievement of the ancient *talionis* principle.

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy – of self-help, vigilante justice, and lynch law."

Furman v. Georgia, supra, 408 U.S. at 308 (concurring opinion of Mr. Justice Stewart). The question of how far retribution, standing alone, is a legitimate goal of the criminal law in the mid-1970's is a complex one; but this case does not present that question for decision, since the death penalty as it is administered under the *Waddell* decree is not retributive in any meaningful way:

> "the issue . . . is not . . . whether it is fair or just that one who takes another person's life should lose his own. Whatever you think about that proposition it is clear that we do not and cannot act upon it generally in the administration of the penal law. The problem rather is whether a small

> and highly random sample of people who commit murder or other comparably serious offenses ought to be despatched, while most of those convicted of such crimes are dealt with by imprisonment."[202]

The concept of retribution requires both a factual equivalency and a procedural regularity in the imposition of punishment[203] which are simply not present in the administration of the death penalty for first degree murder, as we have demonstrated in Part II *supra*. While the *Waddell* death penalty might be sought to be justified indirectly in light of a retributive goal as a device to forestall private acts of vengeance, there is no empirical evidence that lynch law increases as executions decline. In fact, the relation between the lynching rate and the execution rate appears to be more one of direct than inverse proportionality, as the following statistics demonstrate:

Known Executions[204]

Decade	Legal	Illegal
1890's	1,214	1,540
1900's	1,176	885
1910's	1,031	621
1920's	1,162	315
1930's	1,667	130
1940's	1,284	5
1950's	717	2[205]

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[202]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L.F. 249, 255 (1961).

[203]*See also* Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, CAPITAL PUNISHMENT 239, 243 (1967):

> "if we conservatively assume that there are now about 2500 capital murders annually in the United States and but seven executions, it is obvious that a life for a life is rarely taken."

[204]BOWERS, EXECUTIONS IN AMERICA 40 (1974).

[205]Available data on illegal executions ended in 1956 *Ibid.*

There is yet another sense in which the death penalty can be said to bear no meaningful relation to the goal of retribution, for the *lex talionis* affords no commensurability standard. The attempts of various post-*Furman* statutes to authorize the death penalty for "outrageously or wantonly vile, horrible or inhuman" killings[206] attest to this difficulty. For surely there is no retributive logic to justify the simple asphyxiation or electrocution of a defendant who has committed an atrocious crime: such a crime demands a far harsher punishment (under this logic) than the "mere extinguishment of life," *Ex parte Kemmler*, 136 U.S. 436, 447 (1890) But such punishments are clearly forbidden by the Eighth Amendment. With these constitutional limitations, it cannot be asserted that any particular penalty is more supportable by a retributive purpose than any other penalty.

The most frequently voiced justification for the death penalty is the deterrence of capital crimes However, as the empirical findings collected in Appendix E to this brief, pp. 1e-10e *infra*, conclusively demonstrate, there is no credible evidence – despite the most exhaustive inquiry into the subject – that the death

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[206]Ga. Code § 27-2534.1 (1) (7) (1973). *See* Appendix A, p. 22a *infra*.

penalty is a deterrent superior to lesser punishments.[207] The conclusions set forth in Appendix E may be briefly summarized. Official and scholarly inquiries have concluded overwhelmingly that use or disuse of the death penalty has no effect upon the frequency of criminal homicide. This conclusion is based on the following statistical evidence.

> Death penalty jurisdictions do not have a lower rate of criminal homicide than abolition jurisdictions.
>
> Given two states otherwise similar in factors that might affect homicide rates, and differing in that one employs capital punishment while the other does not, the abolition state does not show any consistently higher rate of criminal homicide.

[207]The few published claims of deterrent efficacy are based upon impressionistic accounts of law enforcement officers and do not explain the failure of the death penalty to affect crime rates. *See, e.g.*, Hoover, *Statements in Favor of the Death Penalty*, in BEDAU, THE DEATH PENALTY IN AMERICA 130 (rev. ed. 1967); Allen, *Capital Punishment: Your Protection and Mine*, in BEDAU, THE DEATH PENALTY IN AMERICA 135 (rev. ed. 1967). We know of only one research-based claim of the deterrent efficacy of the death penalty. It is based upon unpublished findings but has been alluded to in a recent article as "indicat[ing] that each execution prevents between 8 and 20 murders." Tullock, *Does Punishment Deter Crime?*, THE PUBLIC INTEREST No. 36 103, 108 (1974), referring to Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, "to be published" in THE AMERICAN ECONOMIC REVIEW, *id.*, at 111. Tullock goes on to say that: ". . . unfortunately, the data available for this study were not what one would hope for, so not as much reliance can be put upon [the] . . . results as one normally would give to work by such a sophisticated econometrician." *Id.* at 108.

> In jurisdictions which abolish the death penalty, abolition has no influence on the rate of criminal homicide.
>
> Jurisdictions which reintroduce the death penalty after having abolished it do not show a decreased rate of criminal homicide after reintroduction.
>
> Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.

The same conclusion has been reached with regard to the "mandatory" death penalty; "no indication" has been found "that the mandatory death penalty [is] . . . a more effective deterrent of homicide than discretionary capital punishment."[208]

These findings are not surprising. For, in the first place, "crimes are committed for reasons other than a rational weighing of consequences."[209] And, in the second place, the very aberrational, violent behavior to which the death penalty is now exclusively applied is less deterrable than any other human behavior, whether the sanction is death or imprisonment:

> "[t]he deterrence argument requires that man be an essentially rational being, weighing all the possible consequences of his acts and rating the desirability of each possible consequence. Whether or not this view of man is generally true is

[208]BOWERS, EXECUTIONS IN AMERICA 160 (1974).

[209]Brief *Amicus Curiae* of the Committee of Psychiatrists for Evaluation of the Death Penalty, in *Aikens v. California*, 406 U.S. 813 [No. 68-5027] pp. 6-7.

debatable, but in the instance of murderers it is most certainly untrue."[210]

C. Public Acceptance of the Penalty of Death

Against the background of this evidence that the death penalty is excessive and unserviceable in terms of

[210]KAKOULLIS, THE MYTHS OF CAPITAL PUNISHMENT 2 (*CENTER FOR RESPONSIBLE PSYCHOLOGY, BROOKLYN COLLEGE*, C.U.N.Y., Report No. 13, 1974). *See also* Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WISC. L. REV. 703; FATTAH, A STUDY OF THE DETERRENT EFFECT OF CAPITAL PUNISHMENT WITH SPECIAL REFERENCE TO THE CANADIAN SITUATION 31-38 (Department of the Solicitor General, Canada, Research Centre Report No. 2, 1972). Indeed, there is strong evidence that the death penalty may service to *incite* murder. It has been reported that in the seventeenth and eighteenth centuries there was an "epidemic of indirect suicides [in Norway and Denmark] . . . when depressed people committed murder in order to be put to death . . . ." *Id.* at 39. In both countries laws were passed specifically exempting such people from the death penalty. "The law passed in Denmark in 1767 abandoned the death penalty in cases where 'melancholy and other dimal persons (committed murder) for the exclusive purpose of losing their lives.'" *Ibid.* Moreover, there is evidence that even the limited publicity surrounding an execution "has a 'brutalizing' effect on the population that more than offset[s] any deterrent effects" by causing an increase in the incidence of homicide in the periods immediately surrounding executions. BOWERS, EXECUTIONS IN AMERICA 20 (1974). *See also* Glaser & Zeigler, *Use of the Death Penalty v. Outrage at Murder*, 20 CRIME & DELINQ. 333 (1974).

the legitimate goals of the criminal justice system, we ask the Court to look again at the use society has made of it. For although the facts warrant a judicial judgment of excessiveness, the Court need not rely solely on its own appraisal of them. Society itself has pronounced a judgment, by its actions if not by its words. That judgment is that the penalty of death is both excessive and unacceptable.

To be sure, thirty jurisdictions have enacted death-penalty legislation since *Furman* (narrower, in all but two cases, than their pre-*Furman* authorizations of capital punishment).[211] But, in every case, the legislature has preserved or created a wide range of selective mechanisms by which the death penalty can be avoided in most cases. Some States have expressly conferred life-or-death sentencing discretion upon capital juries, to be exercised pursuant to standards that purport to confine such discretion but do not do so in fact.[212] Other States allow escape from "mandatory" death penalties through a variety of preconviction and postconviction outlets like those of North Carolina which we have described in Part II at pp. 45-100 *supra*. In this setting at least, the number of legislative authorizations is not – as *Furman* properly held – an appropriate test of acceptability of a harsh punishment. For acceptability is measured by what an enlightened public conscience will allow the law actually to do, not what it will permit a statute to threaten vaguely.[213] And

[211]See note 15, *supra*; Appendix A, pp. 42a-43a, 55a *infra*.

[212]*See* Petition for Writ of Certiorari, *Eberheart v. Georgia*, No. 74-5174 (filed August 19, 1974) pp. 32-36.

[213]"The objective indicator of society's view of an unusually severe punishment is what society does with it . . . ." *Furman v. Georgia, supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

the authors of even purportedly "mandatory" legislation – legislation written to be administered through discretionary judgments of prosecutors, judges, juries, and the Governor – can hardly be unaware that they are not in fact ordaining death except in a fraction of the cases covered by the statute.[214] Prosecutors may be relied upon to "avoid the unacceptably rigorous application of the letter of the law"[215] by filing and accepting pleas to non-capital charges[216] with the

[214]*Cf.* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1252 (1974):

> "[a]s reported previously, a substantial 59 percent of the public now favors capital punishment in principle. No more than 39 percent of the same persons, however, could say, 'If guilt were proven, I could always vote guilty even though the defendant would automatically receive the death penalty.' Another 16 percent agreed with the statement, 'I could never vote guilty, even if guilt were proven, knowing that the defendant would automatically receive the death penalty.' And a larger percent agreed that, 'I could not say in all cases, even if guilt were proven, that I would vote guilty, knowing the defendant would automatically receive the death penalty.'
>
> Thus, by 49-39 percent, the American people indicate that in actual practice they would individually oppose the automatic imposition of the death penalty if a person were proven guilty of a crime such as murder.
>
> The clear implication of these results is that while people feel that capital punishment is the most effective deterrent to crimes that take the life of other persons, there should be much latitude in the way the death sentence is handed out. The public wants to have the death penalty on the books, but would use it sparingly and by no means as an automatic punishment for a capital crime."

[215]*See* text at note 91 *supra.*

[216]*See* pp. 45-61 *supra.*

acquiescence (where required) of trial judges.[217] Juries can be counted on to make sentencing decisions "under the guise of resolving issues of evidential doubt."[218] At the end of the judicial process, the Governor may be expected to provide "an outlet from the rigorous inflexibility"[219] of "mandatory" capital punishment.

We are left, then, with the history of the past as prelude to the future. What that history shows is a rejection of the death penalty that "could hardly be more complete without becoming absolute."[220] Given a choice of punishing "capital" offenders by death or something less, American systems of criminal justice have chosen against death for all but a scant handful of offenders.

> "Although the number cannot be determined with precision, no one can doubt that in each of the

[217]*See* pp. 57,61 *supra.*

[218]KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966). We have seen, indeed, that jury acquittals motivated by a desire to avoid capital punishment under "mandatory" sentencing schemes provided a major impetus for the replacement of those schemes with overtly "discretionary" ones during the late Nineteenth and early Twentieth Centuries. *See* note 133 *supra. Cf.* Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 32, 35 (1974):

> "[a]ntebellum Americans ... whose experience with mandatory capital punishment was extensive, tended to account it a dangerous failure. They were satisfied that mandatory capital punishment did indeed have a deterrent effect; it deterred jurors from convicting palpably guilty men."

[219]*See* text at note 148 *supra.*

[220]*Furman v. Georgia, supra*, 408 U.S. at 300 (concurring opinion of Mr. Justice Brennan).

years involved [1930-1959], with executions ranging from 199 to 48, there were literally thousands of prosecutions that could legally have ended in a capital judgment.

. . . . . .

The conclusion . . . is inescapable that punishment of death is inflicted in the United States on a bare sample of the culprits whose conduct makes them eligible for its imposition . . . .

[T]his experience reveals a deep reluctance in our culture to employ the final sanction. . . ."[221]

This reluctance "to impose or authorize the carrying out of a death sentence"[222] is the more eloquent because of the context in which it has occurred. For it is fair to say that the conditions of administration of capital punishment during the past several decades have been such as to promote its public acceptability to the fullest extent consistent with its nature and the tenor of the public conscience. In the first place, every American execution since 1936 has taken place in secret, isolated by law from the public eye and

[221]Professor Herbert Wechsler, in *Symposium on Capital Punishment*, 7 N.Y.L. F. 249, 252-253 (1961).

[222]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967).

conscience.[223] Indeed, there are but a handful of people in this Nation who have witnessed an execution and can speak with authority to the proposition that:

"... if people were to witness the decay of the waiting man, to hear his cries and watch his final struggles, they would be affronted in their consciences, and in their standards of humanity and of human dignity and decency."[224]

The rarity and secrecy of executions account for the fact that, although it is everywhere agreed that the cruelty of a death sentence is such that its imposition requires extraordinary justification, the wealth of research and theoretical debate on the subject of capital punishment is largely ignored. The often noted fact that "... American citizens know almost nothing about capital punishment"[225] reflects two circumstances: we

[223]The first American State to abolish public executions was Pennsylvania, in 1834. *See* Filler, *Movements to Abolish the Death Penalty in the United States*, 284 ANNALS 124, 127 (1952). Public execution terminated in England in 1868, *see* TUTTLE, THE CRUSADE AGAINST CAPITAL PUNISHMENT IN GREAT BRITAIN 20 (1961); and such executions were progressively outlawed in the United States throughout the Nineteenth Century, *see* BYE, CAPITAL PUNISHMENT IN THE UNITED STATES 6 (1919). The last public execution in the country seems to have occurred in Kentucky in 1936. BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 307 (3rd ed. 1959).

[224]Gottlieb, *Capital Punishment*, 15 CRIME & DELINQ. 1, 6 (1969). *See* West, *Medicine and Capital Punishment*, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong. 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970).

[225]*Furman v. Georgia*, *supra*, 408 U.S. at 362 (concurring opinion of Mr. Justice Marshall) (citing Gold, *A Psychiatric Review of Capital Punishment*, 6 J. FORENSIC SCI. 465, 466 (1961); KOESTLER, REFLECTIONS ON HANGING 164 (Amer. ed. 1957); and DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 257-258 (1962)).

are protected by disuse and by official secrecy from its reality; and, as a consequence, there is no incentive to examine rigorously its justifiability.

But the death penalty also knows a different and less innocent kind of isolation from public consciousness and conscience. It is a fact of human nature that we respond more readily to wrongs committed against those with whom we identify – those most like ourselves in appearance, background and mores. Conversely, wrongs we would not tolerate when done to our own kith or kind are tolerable when inflicted on those we despise or can ignore. The strong extant evidence and observations that the death penalty has been disproportionately applied to racial minorities[226]

[226]Racial discrimination in the imposition of capital punishment has been borne out in a number of discrete and limited but careful studies. Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOCIAL FORCES 369 (1949); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962); Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 18-21, 52-53 (1964). Moreover, it has seemed apparent to responsible commissions and individuals studying the administration of the death penalty in this country. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967); PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT 14-15 (1961); UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) 32, 98 (1968); BEDAU, THE DEATH PENALTY IN AMERICA 411-413 (rev. ed. 1967); CLARK, CRIME IN AMERICA 335 (1970); MATTICK, THE UNEXAMINED DEATH 5, 17 (1966); WOLFGANG & COHEN, CRIME AND RACE: CONCEPTIONS AND MISCONCEPTIONS 77, 80-81 (1970); Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8, 14-17 (1952); Bedau, *A Social Philosopher Looks at the Death*

and to the poor[227] therefore cannot be ignored in

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Penalty, 123 AM. J. PSYCHIATRY 1361, 1362 (1967); *and see* Rubin, *Disparity and Equality of Sentences – A Constitutional Challenge*, 40 F.R.D. 55, 66-68 (1967); BOWERS, EXECUTIONS IN AMERICA 71-120 (1974); Auerbach, *Common Myths About Capital Criminals and Their Victims*, 3 GEORGIA J. CORRECTIONS 41 (1974). Evidence of discrimination has been equally strong when the sentencing systems under study were ostensibly mandatory:

> "... although we have no empirical evidence that the mandatory death penalty is superior to discretionary sentencing as a deterrent to murder, we have seen that it has been associated with higher levels of execution, with comparable levels of racial discrimination, and, very likely, with reduced levels of capital convictions. In view of this evidence, it would appear that the adoption of the mandatory death penalty would mean a greater sacrifice of human life, continued discrimination against blacks, and the inability to convict some guilty offenders, without any deterrent benefit."

BOWERS, *op. cit. supra*, at 162; *see also* Garfinkel, *supra*.

The following are the total numbers of persons executed between 1930 and 1970, broken down by offense and race, as they appear in UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, *Capital Punishment 1930-1970* 12 (August, 1971):

	Murder	Rape	Other	Total
White	1664(49.9%)	48(10.5%)	39(55.7%)	1751(45.4%)
Negro	1630(48.9%)	405(89.1%)	31(44.3%)	2066(53.5%)
Other	40(1.2%)	2(0.4%)	0(0.0%)	42(1.1%)
	3334 (100%)	455(100%)	70(100%)	3859(100%)

[227]"It is the poor, the sick, the ignorant, the powerless and the hated who are executed." CLARK, CRIME IN AMERICA 335 (1970). See DUFFY & HIRSHBERG, 88 MEN AND 2

(continued)

assessing the quality of such acceptance as the penalty has had. For present purposes, it matters little whether these disproportions are the result of discrimination, passive lack of empathy, inadequacy of defense resources 228, or some more benign explanations. The very fact of the disproportion means that public response

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WOMEN 256-257 (1962); LAWES, TWENTY THOUSAND YEARS IN SING SING 302 (1932); LAWES, LIFE AND DEATH IN SING SING 155 (1928); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956); West, *Medicine and Capital Punishment,* in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary,* 90th Cong., 2d Sess., on S. 1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 124, 125 (G.P.O. 1970); McGee, *Capital Punishment as Seen by a Correctional Administrator,* 28 FED. PROB. (No. 2) 11, 12 (1964).

The characteristics of the inmates of death row are described in Bedau, *Death Sentences in New Jersey 1907-1960,* 19 RUTGERS L. REV. 1 (1964); Bedau, *Capital Punishment in Oregon, 1903-1964,* 45 ORE. L. REV. 1 (1965); Carter & Smith, *The Death Penalty in California: A Statistical and Composite Portrait,* 15 CRIME & DELINQ. 62 (1969); Johnson, *Selective Factors in Capital Punishment,* 36 SOCIAL FORCES 165 (1957); Koeninger, *Capital Punishment in Texas, 1924-1968,* 15 CRIME & DELINQ. 132 (1969). *And see* Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae,* in *Boykin v. Alabama,* 395 U.S. 238 (1969) [O.T. 1968, No. 642], p. 7 n.8.

[228]For a review of the disadvantages under which defense of an indigent, low or moderate income person must be conducted, *see* Goldberg, *Equality and Governmental Action,* 39 N.Y.U.L. REV. 205, 218-224 (1964).

to the enormity of the decision to kill a fellow human being is blunted. To the average citizen and the citizen of influence, death remains a penalty for *them,* not for *us.* . At this point, description of the acceptance of capital punishment by contemporary society becomes appropriately cyclical. For infrequent, racially and socially disproportionate application of the death penalty is maintained by the very attitudes it has helped to create. A harsh penalty, unacceptable in general application, is inflicted on the powerless and the unpopular while more sympathetic and attractive classes of defendants are spared. Thus applied, the residue of the penalty is acceptable to the public, which feels no pressure to restrict its broad availability on the statute books. The broad availability of the penalty in turn creates consistent pressure upon prosecutors, jurors, judges, and Governors, to take advantage of a variety of selective mechanisms to avert the punishment from all but an impotent and anonymous few.

This pattern of use, in turn, makes the justifications of capital punishment even more hollow. Reluctant, unpredictable and spotty application of the death penalty deprives it of the least capacity to serve its supposed penal functions. As a deterrent, it is wholly incredible; as a disabler, it is as useless and fortuitous as it is unnecessary; as an instrument of retribution, it is inadequate, haphazard, and unjust. The few men whom it kills die for no reason; they are executed "in the name of a theory in which the executioners do not believe."[229] Distaste for the penalty grows, and fewer men are killed as society "watch[es] without impatience its gradual disappearance."[230]

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[229]Camus, *Reflections on the Guillotine,* in CAMUS, RESISTANCE, REBELLION AND DEATH 131, 141 (Mod. Lib. 1963).

[230]Ancel, *The Problem of the Death Penalty,* in SELLIN, CAPITAL PUNISHMENT 3 (1967).

The cycle can be broken only if the Eighth Amendment is employed in its most vital and essential function: to assure that principles of human decency are universally enforced, even – and especially – where rare and random application of a punishment makes their occasional violation virtually invisible except to the condemned.

CONCLUSION

Petitioner's death sentence is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the North Carolina Supreme Court should therefore be reversed.

Respectfully submitted,

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APPENDIX A

CAPITAL PUNISHMENT STATUTES ENACTED SINCE FURMAN v. GEORGIA

ARIZONA

Arizona provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. Ariz. Rev. Stat. § 13-543(A). The choice between these alternative penalties is made by the trial judge after a separate, post-conviction sentencing hearing. Ariz. Rev. Stat. § 13-454(A). The judge must return a special verdict setting forth his findings as to the existence or non-existence of each of a number of specified aggravating and mitigating circumstances. Ariz. Rev. Stat. § 13-454(C). The burden of establishing aggravating circumstances rests on the State, while the burden of establishing mitigating circumstances rests on the defendant. Ariz. Rev. Stat. § 13-454(B). In neither case is the requisite quantum of proof stated.

In determining whether to impose a life or death sentence:

> "the court shall take into account the mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency."

Ariz. Rev. Stat. § 13-454(D).

The following "aggravating circumstances" are set forth in Ariz. Rev. Stat. § 13-454(E):

"1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner."

The following "mitigating circumstances" are set forth in Ariz. Rev. Stat. § 13-454(F):

"1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases, although plea negotiation is regulated in other ways by Ariz. Rev. Stat., Rule 17.4. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on August 8, 1973.

ARKANSAS

Arkansas provides the death penalty for some cases of "capital felonies." "Capital felonies" are defined by Ark. Code § 41-4702 as (1) treason, and (2) an "unlawful killing" either (a) during the commission or attempted commission of enumerated felonies, or (b) of policemen or other enumerated public officers in the line of duty, or of "any public official or any candidate for public office" when the killing is perpetrated "from a premeditated design to effect the death of the person killed or of any other human being," or (c) of two or more persons pursuant to a similar "premediated design," or (d) by a person already under sentence of death or life imprisonment.

The punishment for a "capital felony" is either death or life imprisonment. Ark. Code § 41-4706. The choice between these alternative penalties is made by a jury after a separate, post-conviction sentencing hearing.

Ark. Code §41-4710(b). The jury must return a special verdict setting forth its findings as to the existence or non-existence of each of a number of specified aggravating and mitigating circumstances. Ark. Code §41-4710(e).

The jury must also set forth in its verdict its conclusion:

> "(i) whether beyond a reasonable doubt sufficient aggravating circumstances . . . exist to justify a sentence of death; [and]
>
> (ii) whether sufficient mitigating circumstances . . . exist to justify a sentence of life imprisonment. . . ."

Ark. Code §4710(d); *see also* Ark. Code §4710(e). And the jury must "render a sentence based upon" these conclusions. Ark. Code §4710(d). When "the jury in its discretion finds mitigating circumstances . . . and determines that these mitigating circumstances preclude the imposition of death . . . , then such crime" is punished by life imprisonment. Ark. Code §41-4703.

The following "aggravating circumstances" are set forth in Ark. Code §41-4711:

> "(a) the capital felony was committed by a person under sentence of imprisonment;
>
> (b) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;
>
> (c) the defendant in the commission of the capital felony knowingly created a great risk of death to one (1) or more persons in addition to the victim;
>
> (d) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

> (e) the capital felony was committed for pecuniary gain; and
>
> (f) the capital felony was committed for the purpose of disrupting or hindering the lawful exercise of any governmental function, political function or the enforcement of laws."

The following "mitigating circumstances" are set forth in Ark. Code §41-4712:

> "(a) the capital felony was committed while the defendant was under extreme mental or emotional disturbance;
>
> (b) the capital felony was committed while the defendant was acting under unusual pressures or influences, or under the domination of another person;
>
> (c) the capital felony was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse;
>
> (d) the youth of the defendant at the time of the commission of the capital felony; or
>
> (e) the capital felony was committed by another person and the defendant was an accomplice or his participation relatively minor."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. Certain procedural and reporting requirements are imposed upon the Governor in the exercise of his clemency power, Ark. Code §41-4714, but his absolute

discretion to grant or deny commutation is left unaltered.

This statute became effective on July 24, 1973.

CALIFORNIA

California provides the death penalty for some cases of first degree murder (Cal. Penal Code § 190.1 (West Supp. 1974)), for some cases of kidnapping for ransom (Cal. Penal Code § 209 (West Supp. 1974)), for some cases of deadly assault by a life-term inmate (Cal. Penal Code § 4500 (West Supp. 1974)), and for some cases of trainwrecking (Cal. Penal Code § 219 (West Supp. 1974)).

The punishment for these crimes is either death or life imprisonment. Cal. Penal Code § § 190.1, 209, 219, 4500 (West Supp. 1974). In cases of first degree murder, the choice between these alternative penalties is made by a jury (or by the trial judge if a jury is waived by the defendant) after a separate, post-conviction sentencing hearing. Cal. Penal Code § 190.1. The jury must return a special verdict setting forth its finding as to the existence or non-existence of each of the "special circumstances" charged. "In case of a reasonable doubt whether a special circumstance is true, the defendant is entitled to a finding that it is not true." Cal. Penal Code § 190.1. However, the burden of proving or disproving "special circumstances" is not allocated, except that "[w]herever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of a crime." Cal. Penal Code § 190.1. In

cases of kidnapping for ransom and trainwrecking, the penalty is death where "any person subjected to any such act suffers death." Cal. Penal Code § § 209, 219. In cases of deadly assault by a life-term inmate, the penalty is death where the victim is a non-inmate who dies within a year and a day "as a proximate result" of the assault. Cal. Penal Code § 4500. The bifurcated trial procedures of Cal. Penal Code § 190.1 are apparently not applicable to the offenses of kidnapping for ransom, trainwrecking or deadly assault by a life-term inmate.

The following "special circumstances" are set forth in Cal. Penal Code § 190.1:

> "(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. . . .
>
> (b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:
>
> (1) The victim is a peace officer . . . who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.
>
> (2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.
>
> (3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery . . .

(ii) Kidnapping . . .

(iii) Rape by force or violence, . . . or by threat of great and immediate bodily harm . . .

(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14 . . .

(v) Burglary . . . of an inhabited dwelling housing entered by the defendant with an intent to commit grand or petit larceny or rape.

(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on January 1, 1974.

COLORADO

Colorado provides the death penalty for some cases of "class 1 felonies." Sec. 4, Col. S.B. No. 46 (1974 sess.) First degree murder, Col. Rev. Stat. 1963 § 40-3-102 (1971 Supp.) and first degree kidnapping, Col. Rev. Stat. 1963 § 40-3-301 are defined as "class 1 felonies."

The punishment for a "class 1 felony" is either death or life imprisonment, Sec. 4, Col. S.B. No. 46 (1974 sess.). The choice between these alternative penalties is made by the trial jury (or the trial court, if a jury was waived) after a separate, post-conviction sentencing hearing. *Ibid.* The jury must return a verdict making a "finding" as to the existence or nonexistence of "aggravating factors" (specified in § 4(5)) and "mitigating factors" (specified in § 4(6)). The burden of establishing "aggravating" or "mitigating" factors is not allocated, and in neither case is the requisite quantum of proof stated.

> "If the sentencing hearing results in a verdict or finding that none of the factors set forth in subsection (5) of this section exist and that one or more of the factors set forth in subsection (6) of this section do exist, the court shall sentence the defendant to death. If the sentencing hearing results in a verdict or finding that none of the aggravating factors set forth in subsection (6) of this section exist or that one or more of the mitigating factors set forth in subsection (5) of this section do exist, the court shall sentence the defendant to life imprisonment. If the sentencing hearing is before a jury and the verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment."

Sec. 4(4), Col. S.B. No. 46 (1974 sess.).

The following "mitigating factors" are set forth in subsection (5), which provides that "[t]he court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:

(a) He was under the age of eighteen; or

(b) His capacity to appreciate wrongfulness [sic] of his conduct or to conform his conduct to

the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."

Sec. 4(5), Col. S.B. No. 46 (1974 sess.).

The following "aggravating factors" are set forth in subsection (6), which provides that "[i]f no factor set forth in subsection (5) of this section is present, the court shall sentence the defendant to death if the sentencing hearing results in a verdict or finding that:

(a) The defendant has previously been convicted by a court of this or any other state, or of the United States, of an offense for which a sentence of life imprisonment or death was imposed under the laws of this state or could have been imposed under the laws of this state if such offense had occurred within this state; or

(b) He killed his intended victim or another, at any place within or without the confines of a penal or correctional institution, and such killing occurred subsequent to his conviction of a class 1, 2, or 3 felony and while serving a sentence imposed upon him pursuant thereto; or

(c) He intentionally killed a person he knew to be a peace officer, fireman, or correctional official.

The term "peace officer" as used in this section means only a regularly appointed police officer of a city, marshal of a town, sheriff, undersheriff, or deputy sheriff of a county, state patrol officer, or agent of the Colorado bureau of investigation; or

(d) He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him; or

(e) He has been a party to an agreement in furtherance of which a person has been intentionally killed; or

(f) He committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used herein, explosive or incendiary device means:

(i) Dynamite and all other forms of high explosives;

(ii) Any explosive bomb, grenade, missile, or similar device; or

(iii) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone.

(g) He committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, he intentionally caused the death of a person, other than one of the participants; or

(h) In the commission of the offense, he knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(i) He committed the offense in an especially heinous, cruel, or depraved manner."

Sec. 4(6), Col. S.B. No. 46 (1974 sess.).

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute was approved in a referendum on November 5, 1974, and becomes effective on January 1, 1975.

CONNECTICUT

Connecticut provides the death penalty for some cases of "capitai felonies." "Capital felonies" are defined by Conn. Gen. Stat. § 53a-45 (3) (P.A. 73-137, [1973] Conn. Leg. Serv. 184 (West)) as (1) "murder" either (a) of policemen or other enumerated public officers in the line of duty, or (b) committed for "pecuniary gain," or (c) committed by one who was previously convicted of murder, or (d) committed by one who is presently serving a life sentence for any crime, or (e) of a kidnap victim, and (2) as "the illegal sale, for gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone, provided such seller was not, at the time of such sale, a drug-dependent person."

The punishment for a "capital felony" is either death or life imprisonment. Conn. Gen. Stat. § 53a-45(4)(e) (P.A. 73-137, [1973] Conn. Leg. Serv. 184 (West)). The choice between these alternative penalties is made by the trial judge or a jury after a separate, post-conviction sentencing hearing. Conn. Gen. Stat. § 53a-45(4)(b). (Such hearing is not held, however, if the State stipulates that no "aggravating factors" are present or that one or more "mitigating factors" are present. Conn. Gen. Stat. § 53a-45(4)(b)). The judge or jury must return a special verdict setting forth its findings as to the existence or non-existence of each of a number of specified aggravating and mitigating circumstances. Conn. Gen. Stat. § 53a-45(4)(b). The burden of establishing aggravating circumstances rests on the State, while the burden of establishing mitigating circumstances rests on the defendant. Conn. Gen. Stat. § 53a-45(4)(c). In neither case is the requisite quantum of proof stated.

If the jury or, if there is no jury, the court finds that one or more of the aggravating circumstances exists and that none of the mitigating circumstances exists, "the court shall sentence the defendant to death." If the jury or, if there is no jury, the court finds that none of the aggravating circumstances exists or that one or more of the mitigating circumstances exists, "the court shall impose the sentence for a class A felony [life imprisonment]." Conn. Gen. Stat. § 53a-45(e).

The following "aggravating circumstances" are set forth in Conn. Gen. Stat. § 53a-45(4)(g):

"(1) the defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the

commission or attempted commission of, a felony and he had previously been convicted of the same felony; or

(2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or

(3) the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or

(4) the defendant committed the offense in an especially heinous, cruel or depraved manner; or

(5) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; or

(6) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value."

The following "mitigating circumstances" are set forth in Conn. Gen. Stat. § 53a-45(4)(f):

"(1) [the defendant] . . . was under the age of eighteen or

(2) [the defendant's] . . . mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution or

(3) [the defendant] . . . was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution or

(4) [the defendant] . . . was criminally liable under sections 53a-8 and 53a-10 of the 1971 noncumulative supplement to the general statutes and section 53a-9 of the 1969 supplement to the general statutes for the offense, which was committed by another, but his participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution or

(5) [the defendant] . . . could not reasonably have foreseen that his conduct in the course of commission of the offense of which he was convicted would cause, or would create a grave risk of causing death to another person."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on October 1, 1973.

DELAWARE

Delaware provides the death penalty for first degree murder. H.B. No. 429, 127th General Assembly (March 29, 1974). "First degree" murder is defined by 11 Del. Code § 636 (1974) as a killing where a defendant:

"(1) . . . intentionally causes the death of another person;

(2) in the course of and in furtherance of the commission or attempted commission of a felony or immediate flight therefrom . . . recklessly causes the death of another person;

(3) intentionally causes another person to commit suicide by force or duress;

(4) . . . recklessly causes the death of a law enforcement officer, Corrections employee or fireman while such officer is in the lawful performance of his duties;

(5) . . . causes the death of another person by the use of or detonation of any bomb or similar destructive device;

(6) . . . with criminal negligence, causes the death of another person in the course of and in furtherance of the commission or attempted commission of rape, kidnapping, arson in the first degree, robbery in the first degree, or immediate flight therefrom;

(7) . . . causes the death of another person in order to avoid or prevent the lawful arrest of any person, or in the course of and in furtherance of the commission or attempted commission of escape in the second degree or escape after conviction."

"In any case in which a person is convicted of first degree murder the Court shall impose a sentence of death." 11 Del. Code §4209(1) (1974).

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on March 29, 1974.

FLORIDA

Florida provides the death penalty for some cases of first degree murder, (Fla. Stat. Ann. §782.04(1)(a)

(cum. supp. 1974)), and for some cases of rape committed by a person seventeen years of age or older upon a child under the age of eleven (Fla. Stat. Ann. §794.01(1) (cum. supp. 1974)).

The punishment for both of these crimes is either death or life imprisonment. Fla. Stat. Ann. §775.082(1). The choice between these alternative penalties is made ultimately by the trial judge after a separate, post-conviction sentencing hearing (although the sentencing proceeding may be conducted before either a judge or jury at the defendant's preference). If a jury has been requested, it renders to the court an advisory sentence as to

> "(a) Whether sufficient aggravating circumstances exist as enumerated in [921.141] subsection (6) and
>
> (b) Whether sufficient mitigating circumstances exist as enumerated in [921.141] subsection (7) which outweigh aggravating circumstances found to exist, and
>
> (c) Based on these considerations whether the defendant should be sentenced to life or death."

Fla. Stat. Ann. §921.141(2). However, "[n]otwithstanding the recommendation of a majority of the jury," the trial judge has unfettered discretion to enter a sentence of life imprisonment or death. If he imposes a sentence of death, however, he must prepare a written report setting forth his findings as to the existence or non-existence of a number of specified aggravating and mitigating circumstances. In choosing between the alternative penalties of life and death, the court (like the jury) must weigh the aggravating and mitigating circumstances and determine which outweighs the other. Fla. Stat. Ann. §921.141(3). The burden of

establishing aggravating or mitigating circumstances is not allocated.

"If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082." Fla. Stat. Ann. §921.141(4). The statute provides for automatic review of a judgment of conviction and sentence of death in the Florida Supreme Court. Fla. Stat. Ann. §921.141(5). *See generally State v. Dixon*, 283 So.2d 1 (Fla. 1973).

The following "aggravating circumstances" are set forth in Fla. Stat. Ann. §921.141(6):

"(a) The capital felony was committed by a person under sentence of imprisonment;

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

(c) The defendant knowingly created a great risk of death to many persons;

(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) The capital felony was committed for pecuniary gain;

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(h) The capital felony was especially heinous, atrocious or cruel."

The following "mitigating circumstances" are set forth in Fla. Stat. Ann. §921.141(7):

"(a) The defendant has no significant history of prior criminal activity;

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The victim was a participant in the defendant's conduct or consented to the act;

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(e) The defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(g) The age of the defendant at the time of the crime."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on December 8, 1972.

GEORGIA

Georgia provides the death penalty for some cases of aircraft hijacking, treason, murder, rape, armed robbery, and kidnapping.

The punishment for these crimes is either death or "imprisonment as provided by law." Ga. Code § 26-3102 (supp. 1973). The choice between these alternative penalties is made by the jury (or the trial judge if the defendant waived a jury). In cases of murder, rape, armed robbery or kidnapping, the choice is made after a separate, post-conviction sentencing hearing. In order to impose the death penalty for any of these crimes, the judge or jury must specifically designate (in writing) "the aggravating circumstance or circumstances which it found beyond a reasonable doubt." Ga. Code § 27-2534.1(c) (supp. 1973). The burden of establishing aggravating or mitigating circumstances is not allocated. Ga. Code § 27-2534.1(a) provides that a death sentence may be imposed "in any case" for the offenses of aircraft hijacking or treason, with no necessity for the trier of fact to make a specific finding of an "aggravating circumstance." *See also* Ga. Code § 26-3102. In such a case, the jury need only make a written "recommendation" of death in order to impose a death sentence. It is unclear from the statute whether a bifurcated trial is to be used for the trial of these crimes.

In any case where a death penalty is imposed, "the sentence shall be reviewed on the record by the Supreme Court of Georgia." Ga. Code § 27-2537(a). With regard to sentence, the Court is to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> (2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b), and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Ga. Code § 27-2537(c). The Supreme Court "shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

> "(1) Affirm the sentence of death; or
>
> (2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared hereinafter provided for, shall be provided to the resentencing judge for his consideration."

Ga. Code § 27-2537(e).

The following "aggravating circumstances" are set forth in Ga. Code § 27-2534.1(b):

> "(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another."

No list of "mitigating circumstances" is provided in the statute (Ga. Code §27-2531.1(b) states, however; that "the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances . . . otherwise authorized by law. . . .")

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on March 28, 1973.

IDAHO

Idaho provides the death penalty for first degree murder. Idaho Code §18-4004 (supp. 1973). "First degree murder" is defined by Idaho Code §18-4003 as "[a]ll murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful deliberate and premeditated killing," "[a]ny murder of any peace officer of this state or of any municipal corporation or political subdivision thereof, when the officer is acting in line of duty, and is known or should be known by the perpetrator of the murder to be an officer so acting," and "[a]ny murder committed by a person under a sentence for murder of the first or second degree."

No new capital procedure is established.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on March 27, 1973.

ILLINOIS

The punishment for first degree murder is either death or life imprisonment. The choice between these alternative penalties is made by a panel of three judges, convened by the chief judge of the circuit, after a separate, post-conviction sentencing hearing. Ill. Rev. Stat. ch. 38, §9-1-(e) (1974). The panel must determine if any of the special circumstances warranting the death penalty exist. The burden of proving that the crime falls within one of the statutory categories for which a death sentence is authorized is on the State; and the State must prove this "beyond a reasonable doubt." Ill. Rev. Stat. ch. 38, §1005-8-1A (1974).

If a majority of the panel determines that any of the special circumstances occurred, "then the court shall sentence the defendant to death unless a majority of the judges of such court determines that there are compelling reasons for mercy and that the defendant should not be sentenced to death." Ill. Rev. Stat. ch. 38, §1005-8-1A (1974). In cases where the death sentence is imposed, a special two stage appeal is provided:

> "In the first stage, the case shall be considered as are all other criminal appeals and the court shall determine whether there are errors occurring at the trial of the case which require that the findings of the trial court be reversed or modified. If the appellate court, in the second stage of the appeal, finds any evidence that the sentence of death was the result of discrimination, the appellate court shall modify the sentence to life imprisonment.
>
> In determining whether there is evidence of discrimination in sentencing the defendant to death, the appellate court shall consider whether the death sentence, considering both the crime and the defendant was disproportionate or the result of discrimination based on race, creed, sex or economic status."

Ill. Rev. Stat. ch. 38, 1005-8-1A (1974).

The following special circumstances are set forth in Ill. Stat. ch. 38, 1005-8-1A (1974):

> "(1) The murdered individual was a peace officer or fireman killed in the course of performing his official duties; or
>
> (2) The murdered individual was an employee of an institution or facility of the Department of Corrections, or its successor agency, killed in the course of performing his official duties, or was otherwise present in such institution or facility with the knowledge and approval of the chief administrative officer thereof; or
>
> (3) Such person has been convicted of murdering two or more individuals under Section 9-1 of the Criminal Code of 1961, as amended, or under any law of the United States or of any State which is substantially identical to Subsection (a) of Section 9-1 of the Criminal Code of 1961, as amended, regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts; or

(4) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance; or

(5) The person committed the murder pursuant to a contract, agreement or understanding by which he was to receive money or anything of value in return for committing the murder; or

(6) The murdered individual was killed in the course of a robbery, rape, aggravated kidnapping, arson or when death occurs following the commission of indecent liberties with a child by a party to the crime."

No list of "mitigating circumstances" (the "compelling reasons for mercy" [Ill. Rev. Stat. ch. 38, § 1005-8-1A (1974)]) is provided in the statute.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases although plea bargaining is regulated in other ways by Ill. Rev. Stat. ch. 110A § 402 (1971). The Governor's clemency power in capital cases is left unaltered.

This statute became effective on July 1, 1974.

INDIANA

Indiana provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. Ind. Ann. Stat. § 10-3401 (a) (supp. 1973). No new capital trial procedure is established. The penalty for first degree murder is life

imprisonment unless one of the circumstances enumerated in Ind. Ann. Stat. § 10-3041(b) (supp. 1973) is found to exist.

The following special circumstances are set forth in Ind. Ann. Stat. § 10-3401(b) (supp. 1973):

"(1) Killing purposely and with premeditated malice a police officer, corrections employee or fireman acting in line of duty.

(2) Killing a human being by the unlawful and malicious detonation of an explosive.

(3) Killing a human being while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary by a person who has had a prior unrelated conviction of rape, arson, robbery, or burglary.

(4) Killing a human being while perpetrating or attempting to perpetrate a kidnapping.

(5) Killing a human being while perpetrating or attempting to perpetrate any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft, train, bus, ship, or other commercial vehicle.

(6) Killing a human being purposely and with premeditated malice:

(i) by a person lying in wait;

(ii) by a person hired to kill;

(iii) by a person who has previously been convicted of murder; or

(iv) by a person who is serving a life sentence."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. While the statute provides that an indictment under § 10-3041(b) may not charge a lesser included offense,

it explicitly provides that "in all situations to which this subsection applies, the jury, or the trial judge if there be no jury, may find the defendant guilty of second degree murder or voluntary or involuntary manslaughter." Ind. Ann. Stat. § 10-3401(b) Plea bargains to lesser included offenses are not prohibited in capital cases; and the Governor's clemency power in capital cases is left unaltered.

This statute became effective on April 24, 1973.

KENTUCKY

Kentucky provides the death penalty for kidnapping where the defendant does not "voluntarily release the victim alive, substantially unharmed, and in a safe place prior to trial" (Sec. 76(2) of the new Kentucky criminal code [H.B. No. 232, Reg. Sess. 1974, amending Ky. Rev. Stat. c. 507]), and for some cases of murder [Sec. 61(2) of the new Kentucky criminal code (H.B. No. 232, Reg. Sess. 1974, amending Ky. Rev. Stat. c. 507)]. Kidnapping is defined by § 76(1) as the unlawful restraint of another person with intent:

"(a) To hold him for ransom or reward; or

(b) To accomplish or to advance the commission of a felony; or

(c) To inflict bodily injury or to terrorize the victim or another; or

(d) To interfere with the performance of a governmental or political function; or

(e) To use him as a shield or hostage."

The punishment for murder is either death or imprisonment for twenty years to life. The punishment is life unless one of the following circumstances exists:

"(a) The defendant's act of killing was intentional and was for profit or hire;

(b) The defendant's act of killing was intentional, and occurred during the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, or rape in the first degree;

(c) The defendant's act of killing was intentional and the defendant was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties;

(d) The defendant's act of killing was intentional and the death was caused through use of a destructive device, as defined in KRS 237.030(1); or

(e) The defendant's act or acts of killing were intentional and resulted in multiple deaths.

(f) The defendant's act of killing was intentional and the victim was a police officer, sheriff or deputy sheriff engaged at the time of the act in the lawful performance of his duties."

Sec. 61(a) of the new Kentucky criminal code (H.B. No. 232, Reg. Sess. 1974, amending Ky. Rev. Stat. c. 507).

No new capital procedure is established. "When a person is convicted of a capital offense he shall have his punishment fixed at death. However, any crime classified as a capital offense may at the discretion of the state be prosecuted as a Class A felony, provided such election to so prosecute is made at the time of indictment." Sec. 275(1) of the new Kentucky criminal

code (H.V. No. 232, Reg. Sess. 1974, amending Ky. Rev. Stat. Chap. 507).

No other standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute becomes effective on January 1, 1975.

LOUISIANA

Louisiana provides the death penalty for first degree murder (La. Rev. Stat. Ann. § 14:30 (supp. 1974)), for "aggravated rape" (La. Rev. Stat. Ann. § 14:42), for treason (La. Rev. Stat. Ann. § 14:113), and for "aggravated kidnapping" (La. Rev. Stat. Ann. § 14:44). "First degree" murder is defined by La. Rev. Stat. Ann. § 14:30 (Supp. 1974) as "the killing of a human being:

> "(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
>
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
>
> (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person,
>
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder."

"Aggravated rape" is defined by La. Rev. Stat. Ann. § 14:22 as:

> "a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:
>
> (1) Where the female resists the act to the utmost, but her resistance is overcome by force.
>
> (2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.
>
> (3) Where she is under the age of twelve years. . . ."

"Treason" is defined by La. Rev. Stat. Ann. § 14:113 as:

> "the levying of war against the United States or the State of Louisiana, adhering to enemies of the United States or the State of Louisiana, or giving such aid and comfort."

"Aggravated kidnapping" is defined by La. Rev. Stat. Ann. § 14:44 as:

> "the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:

(1) The forcible seizing and carrying of any person from one place to another; or

(2) The enticing or persuading of any person to go from one place to another; or

(3) The imprisoning or forcible secreting of any person."

This section also provides that if the kidnap victim is liberated unharmed before sentence is imposed, the death sentence may not be imposed.

Article 817 of the Louisiana Code of Criminal Procedure provides that in a capital case, a jury may not make "[a]ny qualification . . . or addition to a verdict of guilty beyond a specification of the offense as to which the verdict is found."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Article 598 of the Louisiana Code of Criminal Procedure permits conviction of lesser included offenses in a capital case; and Article 814 specifies the "responsive verdicts" which may be returned in any capital case: in first degree murder cases–guilty, guilty of second degree murder, guilty of manslaughter, not guilty (Art. 814(A)(1)); in aggravated rape cases–guilty, guilty of attempted aggravated rape, guilty of simple rape, not guilty (Art. 814(A)(8)); in aggravated kidnapping cases–guilty, guilty of simple kidnapping, not guilty (Art. 814(A)(15)). No "responsive verdicts" are specified for treason cases. While Article 557 prohibits guilty pleas to capital charges, negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

These statutes were or became effective on July 2, 1973.

MISSISSIPPI

Mississippi provides the death penalty for unlawful carnal knowledge of a female under the age of 12 by a person of the age of 18 or older (Miss. Code § 97-3-65, as amended by S.B. No. 2341, Reg. Sess. 1974, § 8), for aircraft piracy (defined as "the seizure or exercise of control, by force or violence or threat of force or violence, of any aircraft within the airspace jurisdiction of the State . . ." [S.B. No. 2341, Reg. Sess. 1974 § 2], and for "capital murder" (Miss. Code § 97-3-21, as amended by S.B. No. 2341, Reg. Sess. 1974, § 7). "Capital murder" is defined by Miss. Code § 97-3-19(2), as amended by S.B. No. 2341, Reg. Sess. 1974, § 6, as "the killing of a human being without the authority of law . . . in the following cases:

(a) murder which is perpetrated by killing a peace officer [as defined] or fireman while such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity, and with knowledge that the victim was a peace officer or fireman . . . ;

(b) murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) when done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;

(f) murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. A capital charge must be alleged by citation of the relevant statutory section in the indictment; and, when a capital charge is so alleged, the judge "shall grant no instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment." (Miss. Code §97-3-19(3), as amended by S.B. No. 2341, Reg. Sess. 1974, §6.) Negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on April 23, 1974.

MONTANA

Montana provides the death penalty for some cases of "aggravated kidnapping" (those in which "the victim is dead as a result of the criminal conduct") [Mont. Rev. Codes Ann. §94-5-304, as amended, c. 126, 43rd Legislative Assembly (March 13, 1974)], and for some cases of "deliberate homicide" (Mont. Rev. Codes Ann. §94-5-102(2)). "Deliberate homicide" is defined by Mont. Rev. Codes Ann. §94-5-102(1) as a criminal homicide which

"(a) . . . is committed purposely or knowingly; or

(b) . . . is committed while the offender is

engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnaping, felonious escape or any other felony which involves the use or threat of physical force or violence against any individual."

Montana Revised Codes Annotated §94-5-103 provides that what would otherwise be "deliberate homicide" is "mitigated deliberate homicide," punishable by up to forty years imprisonment, "when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation."

The punishment for a "deliberate homicide" is either death or "imprisonment in the state prison for any term not to exceed one hundred (100) years." Mont. Rev. Codes Ann. §94-5-102(2). The death sentence is to be imposed by the court if the "deliberate homicide" involves one of the circumstances enumerated in Mont. Rev. Codes Ann. §94-5-105(1). No procedure is set forth for finding these circumstances, and the burden of establishing them is not allocated. Mont. Rev. Codes Ann. §94-5-105(1) (Spec. Crim. Code Supp. 1973), as amended, c. 262, 43rd Legislative Assembly (March 21, 1974) provides that "[W]hen a defendant is convicted of the offense of deliberate homicide the court shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:

(a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or

(b) The defendant was previously convicted of another deliberate homicide; or

(c) The deliberate homicide was committed by means of torture; or

(d) The deliberate homicide was committed by a person lying in wait or ambush; or

(e) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person."

"Mitigating circumstances" are not defined by statute.

Mont. Rev. Codes Ann. §94-5-105(2) (Spec. Crim. Code Supp. 1973), as amended, c. 262 43rd Legislative Assembly (March 21, 1974), provides that "[n]ot withstanding the provisions of subsection (1) and regardless of circumstances, when a defendant is convicted of the offense of deliberate homicide under subsection (1)(a) of section 94-5-102 in which the victim was a peace officer killed while performing his duty the court shall impose a sentence of death."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on January 1, 1974, with amendments effective on March 11, 1974, and July 1, 1974.

NEBRASKA

Nebraska provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. The choice between these alternative penalties is made by a judge or panel of judges after a separate, post-conviction sentencing hearing. Neb. Rev. Stat. §29-2522 (supp. 1973). The judge or judges must return a special verdict setting forth his or their findings as to the existence or non-existence of a number of specified aggravating and mitigating circumstances. Neb. Rev. Stat. §29-2522(2) (supp. 1973). The burden of establishing aggravating or mitigating circumstances is not allocated. In determining whether to impose a life or death sentence, the judge or judges must consider:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; or

(2) Whether sufficient litigating circumstances exist which approach or exceed the weight given to the aggravating circumstances.

Automatic review of death sentences in the Nebraska Supreme Court is provided by Neb. Rev. Stat. §29-2524, and this section also authorizes that Court to reduce death sentences to sentences of life imprisonment.

The following "aggravating circumstances" are set forth in Neb. Rev. Stat. §29-2523(1):

"(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a

substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender of another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws."

The following "mitigating circumstances" are set forth in Neb. Rev. Stat. §29-2523(2):

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on April 20, 1973.

NEVADA

Nevada provides the death penalty for "capital murder", Nev. Rev. Stat. § 200-030(5) (1973). "Capital murder" is defined by Nev. Rev. Stat. § 200-030(1) as "murder" which is perpetrated by:

"(a) Killing a peace officer or fireman:

(1) While such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity; and

(2) With knowledge that the victim is or was a peace officer or fireman.

(b) A person who is under sentence of life imprisonment without possibility of parole;

(c) Executing a contract to kill. For purposes of this paragraph 'contract to kill' means an agreement, with or without consideration, whereby one or more of the parties to the agreement commits murder. All parties to a contract to kill are guilty as principals;

(d) Use or detonation of a bomb or explosive device;

(e) Killing more than one person as the result of a common plan, scheme or design."

First Degree murder, punished by life imprisonment, is "Murder which is:

(a) Perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premediated killing;

(b) Committed in the perpetration or attempted perpetration or rape, kidnapping, arson, robbery, burglary or sexual molestation of a child under the age of 14 years; or

(c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody."

Nev. Rev. Stat. § 200-030(2). Murder of the second degree, punishable by not less than five years imprisonment, is all other kinds of murder. Nev. Rev. Stat. § 200-030(3).

"The jury before whom any person indicted for murder is tried shall, if they find such person guilty thereof, designate by their verdict whether such person is guilty of capital murder or murder of the first or second degree." Nev. Rev. Stat. § 200-030(4) (1973).

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on July 1, 1973.

NEW HAMPSHIRE

New Hampshire provides the death penalty for "capital murder." N.H. c. 34, 1974 General Court Spec. Sess. (April 3, 1974) amending N.H. Rev. Stat. Ann., § 630:1 (I). "Capital murder" is defined by c. 34, 1974 General Court Spec. Sess. (April 3, 1974) amending N.H. Rev. Stat. Ann., § 630, as "knowingly causing the death of:

(a) A law enforcement officer [as defined] acting in the line of duty;

(b) Another before, after, while engaged in the commission of, or while attempting to commit kidnapping as that offense is defined in RSA 633:1;

(c) Another by criminally soliciting a person to cause said death or after having been criminally solicited by another for his personal pecuniary gain."

No new capital procedure is provided.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on April 15, 1974.

NEW MEXICO

New Mexico provides the death penalty for "first degree" murder. N.M. Stat. Ann. §§40A-2-1, 40A-20-2 (supp. 1973). "First degree" murder is defined by N.M. Stat. Ann. §40A-2-1 as any murder perpetrated:

> "(1) by any kind of willful, deliberate and premediated killing;
>
> (2) by means of poison, lying in wait or torture;
>
> (3) in the commission of or attempt to commit any felony;
>
> (4) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life; or
>
> (5) from a deliberate and premediated design unlawfully and maliciously to effect the death of any human being.

Second degree murder "consists of all other murder," N.M. Stat. Ann. §40A-2-1(B) committed with "malice" but without "premeditation" or "deliberation". *Torres v. State*, 39 N. Mex. 191, 43 P.2d 929, 930-931 (1935). Manslaughter is defined as "the unlawful killing of a human being without malice." N.M. Stat. Ann., §40A-2-3.

"When a defendant has been convicted of a capital felony, the judge shall sentence that person to death." N.M. Stat. Ann., §40A-29-2 (supp. 1973). However, New Mexico utilizes an "open" indictment for murder (N.M. R. Crim. Proc. 5(d) (N.M. Stat. Ann., §41-23-5(d)), and N.M. R. Crim. Proc. 8 (N.M. Stat. Ann., §41-23-8)), and the jury determines the degree of

the homicide, *see State v. Burrus*, 38 N. Mex. 293 462, 35 P.2d 285, 289-290 (1934); *State v. Bentford*, 39 N. Mex. 293, 46 P.2d 658 (1935); *State v. Wickman*, 29 N.M. 198, 43 P.2d 933 (1935); *State v. Horton*, 59 N.M. 257, 258 P.2d 371 (1953). The jury must ordinarily decide in a homicide case whether a defendant is guilty of first degree murder, second degree murder, or manslaughter.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on March 20, 1973.

NEW YORK

New York provides the death penalty for "murder in the first degree." "First degree" murder is defined by Penal Law §125.27, added by §5 of S. 21028 (Cal. No. 1548) (Ass. B. 11474-A), N.Y. Laws 1974, as a crime in which a person, who is over eighteen years old, "[w]ith intent to cause the death of another person . . . causes the death of such person; and [e]ither:

> (i) the victim was a police officer . . . [as defined] who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known, that the victim was a police officer; or

(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional facility . . . [as defined] who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institutional or a local correctional facility; or

(iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the maximum of which was natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody."

"When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death." Penal Law §60.06 (added by S. 21028 (Cal. No. 1548) (Ass. B 11474-A), N.Y. Laws 1974). However, Penal Law §125.27(2) provides that for any prosecution for murder in the first degree, "it is an affirmative defense that:

"(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph

shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude the conviction of, manslaughter in the second degree or any other crime except murder in the second degree."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. While a defendant is not allowed to enter a plea of guilty to murder in the first degree (Penal Law §§220.10(6), as amended by §10 of S. 21028 (Cal. No. 1548) (Ass. B. 11474-A), N.Y. Laws 1974), convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on September 1, 1974.

NORTH CAROLINA

North Carolina provides the death penalty for "first degree" murder (§1, c. 1201, S.B. 157, 1973 Session (2d Session, 1974)) amending N.C. Gen. Stat. §14-17 (repl. vol. 1969), and for "first degree" rape (§2, c. 1201, S.B. 157, 1973 Session (2d Session 1974)) amending N.C. Gen. Stat. §1421 (repl. vol. 196). "First

degree" murder is defined by §1, c. 1201, S.B. 157, 1973 Session (2d Session, 1974) as "[a] murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony." "First degree" rape is defined by §2, Chap. 1201, S.B. 157, 1973 Session (2d Session 1974) as a rape by a person more than sixteen years old upon "a virtuous female child under the age of twelve years" or as a rape in which "the rape victim [regardless of age] had her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her."

No new capital procedure is provided.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on April 8, 1974.

OHIO

Ohio provides the death penalty for some cases of "aggravated murder."

The punishment for aggravated murder is either death or life imprisonment. Ohio Rev. Code Ann. §2929.02(A) (Page Spec. Supp. 1973). The choice between these alternative penalties is made by the trial

judge (or by a three judge panel if the defendant waived a jury trial and was tried by a three judge panel) after a separate, post-conviction sentencing hearing. Ohio Rev. Code Ann. §2929.03(C) (Page Spec. Supp. 1973). If the jury finds a defendant guilty of murder and if the indictment contained an allegation of an "aggravating circumstance", then the trial judge (or the three judge panel where the defendant has waived a jury trial) is to pronounce a death sentence unless he determines that one of the enumerated mitigating circumstances exist. The burden of establishing aggravating circumstances rests on the State, and their existence must be established at trial "beyond a reasonable doubt." Ohio Rev. Code Ann. §2929.04(A) (Page Spec. Supp. 1973). Despite the proof beyond a reasonable doubt of one of the aggravating circumstances, the death penalty is precluded if one or more of the enumerated mitigating circumstances is established by "a preponderance of the evidence." Ohio Rev. Code Ann. §2929.04(B) (Page Spec. Supp. 1973).

The following "aggravating circumstances" are set forth in Ohio Rev. Code Ann. §2929.04(A)(Page Spec. Supp. 1973):

> "(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detention, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravating robbery, or aggravated burglary."

The following "mitigating circumstances" are set forth in Ohio Rev. Code Ann. §2929.04(B) (Page Spec. Supp. 1973):

"(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency,

though such condition is insufficient to establish the defense of insanity."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas of lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on December 22, 1972.

OKLAHOMA

Oklahoma provides the death penalty for first degree murder. Okla. Stat. tit. 21, §701.3. "First degree" murder is defined by Okla. Stat. tit. 21, §701.1, as "[h]omicide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, . . ." in the following cases:

"1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;

2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;

3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of the witness, or

when perpetrated against any human being while intending to kill such witness;

4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

7. Murder by a person under a sentence of life imprisonment in the penitentiary;

8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

In a jury trial, "the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilt shall so indicate on their verdict and state affirmatively in their

verdict that the defendant shall suffer death." Okla. Stat. tit. 21, § 701.3. In a bench trial or after a guilty plea, the judge determines whether the defendant is guilty of first degree murder and, if so, "shall enter a judgment and sentence of death." *Ibid.*

When reviewing a death sentence, the Court of Criminal Appeals (if "there are no errors of law in the record requiring a reversal or modification") must conduct

> "an evidentiary hearing, the purpose of which will be to determine if the sentence of death comports with the principles of due process and equal protection of the law. Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Okla. Stat. tit. 21, § 701.5. If the Court determines "that the sentence of death is discriminatory or is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, [it]. . .shall modify the sentence of death to life in the penitentiary at hard labor." Okla. Stat. tit. 21, § 701.6.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. "In a jury trial, nothing in [the] . . . section [punishing first degree murder with death and providing that the jury shall determine only whether the defendant is guilty or not guilty of first degree murder] shall preclude the

trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions; but in every instance where an instruction authorizes the jury to consider lesser and included offenses and lesser degrees of homicide, the judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial." Okla. Stat. tit. 21, §701.3. Negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on May 17, 1973.

PENNSYLVANIA

Pennsylvania provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. Pa. Act No. 46, 158th General Assembly (March 26, 1974) enacting tit. 18, c. 13, §1311(d). The choice between these alternative penalties is made by the jury after a separate, post-conviction sentencing hearing. The jury must return its verdict based on its findings as to the existence or non-existence of specified aggravating and mitigating circumstances. The burden of establishing aggravating circumstances rests on the State, and their existence must be established beyond a reasonable doubt. Mitigating circumstances must be proved by a preponderance of the evidence. Pa. Act No. 46, 158th General Assembly (March 26, 1974) enacting tit. 18, c. 13, §1311(c)).

In determining whether to impose a life or death sentence, agreement by the jury upon aggravating or mitigating circumstances must be unanimous, and if the jury is unable to agree, the court is directed to impose a sentence of life imprisonment. If the jury finds at least one aggravating circumstance and no mitigating circumstances, the court is to impose a death sentence. *Id.*, enacting tit. 18, c. 13 §1311(d). If the jury finds at least one mitigating circumstance or if it finds no aggravating or mitigating circumstances, a sentence of life imprisonment is to be imposed. *Id.*, enacting tit. 18, c. 13, §1311(d). Automatic review of death sentences in the Pennsylvania Supreme Court is provided. *Id.*, enacting tit. 18, c. 13. §1311(g).

The following "aggravating circumstances" are set forth in Pa. Act. No. 46, 158th General Assembly (March 26, 1974) enacting tit. 18, c. 13, §1311(d)(1):

"(i) The victim was a fireman, peace officer or public servant concerned in official detention as defined in section 5121 of this title (relating to escape), who was killed in the performance of his duties.

(ii) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(iii) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(iv) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(v) The victim was a witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

(vi) The defendant committed a killing while in the perpetration of a felony.

(vii) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(viii) The offense was committed by means of torture.

(ix) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense."

The following "mitigating circumstances" are set forth in Pa. Act. No. 46, 158th General Assembly (March 26, 1974) enacting tit. 18, c. 13, §1311(d)(2):

"(i) The age, lack of maturity, or youth of the defendant at the time of the killing.

(ii) The victim was a participant in or consented to the defendant's conduct as set forth in section 1311(d) of this title or was a participant in or consented to the killing.

(iii) The defendant was under duress although not such duress as to constitute a defense to prosecution. . . ."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on March 26, 1974.

RHODE ISLAND

Rhode Island provides the death penalty for murder committed by a prison inmate. Rhode Island General Laws Annotated §11-23-2 (Supp. 1973) provides that "[e]very person who shall commit murder while committed to confinement to the adult correctional institutions or the state reformatory for women shall be punished by death. The punishment of death shall be inflicted by the administration of a lethal gas."

No new capital procedure is provided.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on June 26, 1973.

SOUTH CAROLINA

South Carolina provides the death penalty for some cases of murder.

The punishment for murder is either death or life imprisonment. Section 1 of Act 1109 (R. 1276, S. 270), S.C. Laws 1974, amending S.C. Code § 16-52 (1962). The death penalty is imposed on those found guilty of murder under specified circumstances. Life imprisonment is imposed on all other types of murder. No new capital procedure is provided.

Section 3 of this Act provides that "[t]he Supreme Court shall review each conviction of a capital offense by any court in this State."

The following circumstances requiring the death penalty are set forth in Section 1 of Act 1109 (R. 1276, S. 270), S.C. Laws 1974, amending S.C. Code § 16-52 (1962):

> (1) Murder committed while in the commission of the following crimes or acts: (a) rape; (b) assault with intent to ravish; (c) kidnapping; (d) burglary; (e) robbery while armed with a deadly weapon; (f) larceny with use of a deadly weapon; (g) housebreaking; (h) killing by poison; (i) lying in wait.
>
> (2) Murder committed for hire based on some consideration of value.
>
> (3) Murder of a law enforcement officer or correctional officer while acting in the line of duty.
>
> (4) The person convicted of committing the murder has previously been convicted of murder, or was convicted of commiting more than one murder.
>
> (5) Murder that is willful, deliberate and premeditated."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on July 2, 1974.

TENNESSEE

Tennessee provides the death penalty for rape of a victim under 12 years of age (Tenn. Code Ann. § 39-3702, as amended by Public Chap. 461, Tenn. Laws 1974) and for first degree murder (Tenn. Code Ann. § 39-2402, as amended by Public Chap. 462, Tenn. Laws 1974). "First degree" murder is defined by Tenn. Code Ann. § 39-2402, as amended by Public Chap. 462, Tenn. Laws 1974, as an act committed by an individual wherein:

> (1) he commits a willful, deliberate, malicious and premeditated killing or murder;
>
> (2) he commits a willful, deliberate and malicious killing or murder, and:
>
> (a) the victim is an employee of the Department of Correction having custody of the actor,
>
> (b) the victim is a prison inmate in custody with the actor,
>
> (c) the victim is known to the actor to be a peace officer or fireman acting in the course of his employment,
>
> (d) the victim is a judge acting in the course of his judicial duties,

(e) the victim is a popularly elected public official,

(f) the offense is committed for hire; or attempting to evade law enforcement officials.

(3) he hires ahother to commit a willful, deliberate, malicious and premediated killing or murder, and such hiring causes the death of the victim; or

(4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb."

"When a person is convicted of the crime of murder in the first degree, or as an accessory before the fact of such a crime, it shall be the duty of the jury convicting him in their verdict to fix his punishment at death as provided by law." Tenn. Code Ann. §39-2406, as amended by Public Chap. 462, Tenn. Laws 1974.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

These statutes became effective on February 27, 1974.

TEXAS

Texas provides the death penalty for some cases of "capital murder." "Capital murder" is defined by Tex. Pen. Code § 19.03(a) as a killing where:

"(1) The person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) The person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) The person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) The person commits the murder while escaping or attempting to escape from a penal institution; or

(5) The person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution."

The punishment for "capital murder" is either death or life imprisonment. The choice between these alternative penalties is made by a jury after the trial in a separate sentencing hearing. Tex. Code Crim. Proc. Art. 37.071(a). At this post-conviction hearing, the jury must return a special verdict setting forth its findings on three specified issues:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

Tex. Code Crim. Proc. Art. 37.071(b).

The State must prove each of these three issues beyond a reasonable doubt (Tex. Code Crim. Proc. Art. 37.071(c)), and the jury must unanimously return a "yes" answer to each of these issues to impose a death sentence. Ten "no" votes on any one of the issues are sufficient to prevent the imposition of a death sentence. Tex. Code Crim. Proc. Art. 37.071(d).

"If the jury returns an affirmative finding on each issue submitted . . . the court shall sentence the defendant to death. If the jury returns a negative finding on any issue . . . the court shall sentence the defendant to confinement in the Texas Department of Corrections for life." Tex. Code Crim. Proc. Art. 37.071(e).

Automatic review of death sentences is provided in the Texas Court of Criminal Appeals. Tex. Code Crim. Proc. Art. 37.071(f).

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. In a "capital murder" case, the jury is given explicit power to convict of "capital murder," "murder," or "any other lesser offense." Tex. Pen. Code § 19.03(c). Negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on June 14, 1973.

UTAH

Utah provides the death penalty for some cases of first degree murder and for some cases of "aggravated kidnappings," crimes which are deemed to be "capital felonies". "First degree" murder is defined by Utah Code Ann. § 76-5-202(1) as an act in which "the actor intentionally or knowingly causes the death of another under any of the following [aggravating] circumstances:

(a) The homicide was committed by a convict under sentence of imprisonment.

(b) At the time the homicide was committed the actor also committed another homicide.

(c) The actor knowingly created a great risk of death to a person other than the victim and the actor.

(d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape, forcible sodomy, or aggravated sexual assault or arson, burglary, or kidnapping.

(e) The homicide was committed for the purpose of avoiding or preventing an arrest by a peace officer acting under color of legal authority or for the purpose of effecting an escape from lawful custody.

(f) The homicide was committed for pecuniary or other personal gain.

(g) After having previously been convicted of first or second degree murder.

(h) The homicide was committed upon a child under the age of twelve years as the result of physical abuse or neglect."

"Aggravated kidnapping" is defined by Utah Code Ann. § 76-5-302 as an act in which a person "intentionally or knowingly, by force, threat, or deceit, detains or restrains another against his will with intent:

> (a) To hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;
>
> . (b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or
>
> (c) To inflict bodily injury on or to terrorize the victim or another; or
>
> (d) To interfere with the performance of any governmental or political function."

Aggravated kidnapping is reduced to "a felony of the first degree" (rather than a "capital felony") if the victim is released "alive and in a safe place before trial." Utah Code Ann. § 76-5-302(3).

The punishment for "capital felonies" is either death or life imprisonment. Utah Code Ann. § 76-3-207(2). The choice between these alternative penalties is made by the trial judge or jury after a separate, post-conviction sentencing hearing. Utah Code Ann. § 76-3-207(1). The judge or jury must render a decision as to whether the death sentence is to be imposed after weighing the aggravating and mitigating circumstances. The statute provides no formula for weighing aggravating factors against mitigating ones, and the burden of establishing aggravating or mitigating circumstances is not allocated.

"If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury

and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death, the court shall discharge the jury and impose the sentence of life imprisonment." Utah Code Ann. § 76-3-207(2).

The Utah Supreme Court is authorized to review the appropriateness of death sentences, and "if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court, in which event the trial court shall impose the sentence of life imprisonment." Utah Code Ann. § 76-3-207(3).

"Aggravating circumstances" include those enumerated in the definition of first degree murder (Utah Code Ann. § 76-5-202(1)).

The following "mitigating circumstances" are set forth in Utah Code Ann. § 76-3-207(1):

> "(a) The defendant has no significant history of prior criminal activity;
>
> (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> (c) The defendant acted under extreme duress or under the substantial domination of another person;
>
> (d) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental disease, intoxication, or influence of drugs;
>
> (e) The youth of the defendant at the time of the crime;

(f) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(g) And any other fact in mitigation of the penalty."

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on July 1, 1973.

WYOMING

Wyoming provides the death penalty for some cases of first degree murder.

The punishment for first degree murder is either death or life imprisonment. Death is imposed "if the trier of fact finds the [murder in the first degree]... involve[d] the following course of conduct:

(i) Murder of any peace officer, corrections employee or fireman acting in the line of duty;

(ii) A murder committed for profit or reward of any kind by a defendant after being hired by any person, or the employment or inducement of another to commit murder;

(iii) Intentional murder by the unlawful and malicious use or detonation of any explosive;

(iv) Murder committed by a person who had previously been convicted of murder in the first or second degree;

(v) Murder committed by a defendant while under the sentence of life imprisonment;

(vi) Murder committed in the perpetration of or attempt to perpetrate a rape where the defendant had previously been convicted of rape; murder committed in the perpetration of or attempt to perpetrate arson where the defendant had previously been convicted of arson; murder committed in the perpetration of or attempt to perpetrate a robbery where the defendant had previously been convicted of a robbery; murder committed in the perpetration of or attempt to perpetrate a burglary where the defendant had previously been convicted of a burglary;

(vii) Murder of any person perpetrated in the course of a kidnapping;

(viii) Murder in the course of the hijacking of a commercial airplane, train, bus, boat or other commercial vehicle;

(ix) Murder committed by a defendant to conceal his identity or to conceal the fact of the commission of a crime, or to suppress evidence;

(x) Murder of two or more persons in one series of related events."

Wyo. Stat. Ann. § 6-54(b) (supp. 1973).

It appears that the guilt and sentence determination will ordinarily be made simultaneously, since Wyo. Stat. Ann. § 6-54(c) (supp. 1973) provides that only for the courses of conduct specified in sub-sections (iv), (v), and (vi) of Wyo. Stat. Ann. § 6-54(b) (supp. 1973) will the determination relevant to sentence (that the defendant had a prior conviction) be made at a separate, post-conviction proceeding.

Automatic review of death sentences is provided in the Wyoming Supreme Court. Wyo. Stat. Ann. § 6-54(d) (supp. 1973).

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

This statute became effective on February 24, 1973.

APPENDIX B

NORTH CAROLINA DEFENDANTS SENTENCED TO DEATH UNDER THE PROCEDURES ESTABLISHED BY STATE v. WADDELL

1. *Henry N. Jarrette*: Union County Super. Ct. Nos. 73-Cr-1342, 73-Cr-1339, 73-Cr-2843, 73-Cr-1341 (June 21, 1973) (death sentence for first degree murder and rape); aff'd 284 N.C. 625, 202 S.E.2d 721 (1974); *pending on petition for cert.*, U.S. Sup. Ct. No. 73-6877 (filed June 11, 1974).
2. *Albert Crowder, Jr.*: Wake County Super. Ct. No. 73-Cr-14190 (July 18, 1973) (death sentence for first degree murder); *aff'd* 285 N.C. 42, 203 S.E.2d 38 (1974); pending on *petition for cert.*, U.S. Sup. Ct. No. 73-6878 (filed June 11, 1974).
3. *David Earl Dillard*: Robeson County Super. Ct. No. 73-Cr-5807 (Aug. 1, 1973) (death sentence for first degree murder); *aff'd* 285 N.C. 203 S.E.2d 5 (1974); *pending on petition for cert.*, U.S. Sup. Ct. No. 74-6875 (filed June 11, 1974).
4. *Tommy Noell*: Orange County Super. Ct. No. 73-Cr-4142 (Aug. 3, 1973) (death sentence for rape); *aff'd* 284 N.C. 670, 202 S.E.2d 750 (1974); *pending on petition for cert.*, U.S. Sup. Ct. No. 73-6876 (filed June 11, 1974).
5. *Isaac Sherill Monk*: New Hanover County Super. Ct. No. 73-Cr-5871 (Aug. 1973) (death sentence for first degree murder); *appeal pending* N.C. Sup. Ct. No. 34 (Fall Term, 1973).

6. *Alton James Henderson*: Alamance County Super. Ct. No. 73-Cr-7771 (Sept. 5, 1973) (death sentence for first degree burglary and rape); *aff'd* 285 N.C. 1, 203 S.E.2d 10 (1974); *pending on petition for cert.*, U.S. Sup. Ct. No. 73-6853 (filed June 8, 1974).

7. *Jesee Thurman Fowler*: Wake County Super. Ct. No. 73-Cr-41907 (Sept. 24, 1973) (death sentence for first degree murder); *aff'd* 285 N.C. 90, 203 S.E.2d 803 (1974); *cert. granted* Oct. 29, 1974, U.S. Sup. Ct. No. 73-7031.

8. *Billy Honeycutt*: Duplin County Super. Ct. No. 73-Cr-3822 (Oct. 5, 1973) (death sentence for first degree murder) *aff'd* 285 N.C. 184, 203 S.E.2d 844 (1974); *pending on petition for cert.*, U.S. Sup. Ct. No. 73-7032 (filed July 9, 1974).

9. *Mamie Lee Ward*: Edgecombe County Super. Ct. No. 73-Cr-6706 (Sept. 19, 1973) (death sentence for first degree murder); *appeal pending*, N.C. Sup. Ct. No. 30 (Spring Term, 1974).

10. *Mickey Bell*: Robeson County Super. Ct. No. 73-Cr-12351 (Oct. 18, 1973) (death sentence for first degree murder); *appeal pending*, N.C. Sup. Ct. No. 27 (Spring Term, 1975).

11. *Kelly Dean Sparks*: Guilford County Super. Ct. No. 73-Cr-19776 (Nov. 1, 1973) (death sentence for first degree murder); *aff'd* _____ N.C. _____, 207 S.E.2d 71 (1974).

12. *Earl Jerome White*: Alamance County Super. Ct. No. 73-Cr-12672 (Dec. 6, 1973)(Death sentence for first degree murder); *appeal pending*, N.C. Sup. Ct. No. 83 (Spring Term, 1974).

13. *Vernon Brown*: Edgecombe County Super. Ct. No. 73-Cr-7378 (Dec. 9, 1973) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 15 (Fall Term, 1974).

14. *Bobby Hines*: Edgecombe County Super. Ct. No. 73-Cr-7238 (Dec. 9, 1973) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 15 (Fall Term, 1974).

15. *Jesse Lee Walston*: Edgecombe County Super. Ct. No. 73-Cr-7239 (Dec. 9, 1973) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 15 (Fall Term, 1974).

16. *George Vick*: Beaufort County Super. Ct. No. 73-Cr-5687 (Dec. 12, 1973) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 15 (Fall Term, 1974).

17. *Frank Pruitt*: Cumberland County Super. Ct. Nos. 73-Cr-35545, 73-Cr-35546, 73-Cr-35547, 73-Cr-35548 (Jan. 29, 1974) (death sentence for first degree murder and arson); *appeal pending*, N.C. Sup. Ct. No. 24 (Spring Term, 1974).

18. *Reginald Renard Lampkins*: Forsyth County Super. Ct. No. 73-Cr-43023 (Jan. 18, 1974) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 22 (Spring Term, 1974)

19. *Vernon Junior Woods*: Catawba County Super. Ct. Nos. 73-Cr-20545, 73-Cr-20546, 73-Cr-20547 (Jan. 29, 1974) (death sentence for first degree murder and rape); *appeal pending*, N.C. Sup. Ct. No. 25 (Spring Term, 1974).

20. *Bryant Henry Williams, Jr.*: Wake County Super. Ct. No. 73-Cr-32521 (Jan. 31, 1974) (death sentence for rape); *appeal pending*, N.C. Sup. Ct. No. 25 (Spring Term, 1975).

21. *George James Patterson*: Forsyth County Super. Ct. No. 73-Cr-22457 (Feb. 5, 1974) (death sentence for first degree murder); *appeal pending*, N.C. Sup. Ct. No. 29 (Spring Term, 1974).

22. *Lawrence McCall*: Transylvania County Super. Ct. Nos. 73-Cr-1821 and 73-Cr-1829 (Feb. 9, 1974) (death sentence for first degree murder); *appeal pending*, N.C. Sup. Ct. No. 28 (Fall Term, 1974)

23. *James Avery*: Bertie County Super. Ct. No. 73-Cr-2247 (Feb. 17, 1974) (death sentence for first degree murder); *appeal pending* N.C. Sup. Ct. No. 27 (Fall Term, 1974).

24. *Alexander McLaughlin*: Robeson County Super. Ct. Nos. 73-Cr-18024, 74-Cr-228, 74-Cr-229, 74-Cr-230, 74-Cr-231 and 74-Cr-232 (Feb. 28, 1974) (death sentences for first degree murder and arson); *appeal pending*, N.C. Sup. Ct. No. 29 (Fall Term, 1974).

25. *Michael Burns*: Onslow County Super. Ct. No. 74-Cr-1012 (Mar. 1, 1974) (death sentence for rape).

26. *Robert Gary Bock*: Moore County Super. Ct. No. 73-Cr-6324 (Mar. 8, 1974) (death sentence for first degree murder).

27. *Ernest Armstrong*: Harnett County Super. Ct. No. 73-Cr-10951 (Mar. 21, 1974) (death sentence for rape).

28. *Ernest John Vinson*: Wilson County Super. Ct. No. 73-Cr-9325 (Mar. 27, 1974) (death sentence for rape).

29. *Frank James Silver*: Nash County Super. Ct. No. 74-Cr-192 (April 4, 1974) (death sentence for first degree murder).

30. *John Richard Stegmann*: Cumberland County Super. Ct. No. 73-Cr-30527 (May 16, 1974 (death sentence for rape).

31. *Richard Gordon*: Mecklinberg County Super. Ct. Nos 73-Cr-56187 and 73-Cr-56188 (May 29, 1974) (death sentence for first degree murder).

32. *Timothy Wesley Robbins*: Guilford County Super. Ct. Nos. 74-Cr-19674, 74-Cr-19770 and 74-Cr-19771 (May 31, 1974) (death sentence for first degree murder).

33. *Charles D. Thompson*: Rutherford County Super. Ct. No. 74-Cr-1222 (June 1, 1974) (death sentence for first degree murder).

34. *Wayne Foddrell*: Caswell County Super. Ct. No. 73-Cr-1439 (June 7, 1974) (death sentence for rape).

35. *Rozell Oxendine Hunt*: Anson County Super. Ct. No. 74-Cr-1538 (June 13, 1974) (death sentence for first degree murder).

36. *Crawford Dean Lowery*: Alamance County Super. Ct. No. 73-Cr-8718 (June 13, 1974) (death sentence for rape).

37. *Fernando Hunt*: Vance County Super. Ct. Nos. 74-Cr-550, 74-Cr-551 and 74-Cr-552 (June 13, 1974) (death sentence for rape).

38. *Ernest Ray Simmons*: Nash County Super. Ct. No. 74-Cr-194 (June 14, 1974) (death sentence for first degree murder).

39. *Tharroy Davis*: Lenoir County Super. Ct. Nos. 74-Cr-1102, 74-Cr-1103 (June 16, 1974) (death sentence for first degree murder).

40. *Joseph Clinton Foster*: Lenoir County Super. Ct. Nos. 74-Cr-1248, 74-Cr-1249 (June 16, 1974) (death sentence for first degree murder).

41. *Thurman Lee Strickland*: Ouslow County Super. Ct. Nos. 74-Cr-3671, 74-Cr-3672, 74-Cr-10568 (June 29, 1974) (death sentence for first degree murder).

42. *Johnny Hennesy Boyd*: Lincoln County Super. Ct. No. 74-Cr-4806 (July 27, 1974) (death sentence for first degree burglary).

43. *Bobby Clinton Foster*: Mecklinberg County Super. Ct. Nos. 74-Cr-1600, 74-Cr-1601 (Nov. 22, 1974) (death sentence for first degree murder).

44. *Thomas Lee King*: Gaston County Super. Ct. No. 74-Cr-4357 (Aug. 1, 1974) (death sentence for first degree murder).

45. *Joseph King*: Gaston County Super. Ct. No. 74-Cr-4358 (Aug. 1, 1974) (death sentence for first degree murder).

46. *Roger Lawrence Wetmore*: Rowan County Super. Ct. No. 74-Cr-2010 (Aug. 2, 1974) (death sentence for first degree murder).

47. *Ronnie Young*: Mecklinberg County Super. Ct. Nos. 73-Cr-56206, 73-Cr-56207 (Aug. 8, 1974) (death sentence for first degree murder).

48. *Joe Lewis White*: Scotland County Super. Ct. No. 74-Cr-2007 (Aug. 15, 1974) (death sentence for first degree murder).

49. *James Edward Britt*: Robeson County Super. Ct. No. 73-Cr-6567 (Sept. 20, 1974) (death sentence for first degree murder).

50. *Larry Bernard*: New Hanover County Super. Ct. No. 73-Cr-20420 (Oct. 3, 1974) (death sentence for rape).

51. *Pinkney Thomas Mitchell, Jr.*: Gaston County Super. Ct. No. 74-Cr-9519 (Oct. 30, 1974) (death sentence for first degree murder).

52. *David B. Smith*: Mecklinberg County Super. Ct. Nos. 74-Cr-1598, 74-Cr-1599 (Nov. 22, 1974) (death sentence for first degree murder).

APPENDIX C

REPRESENTATIVE NORTH CAROLINA HOMICIDE CASES

In the following cases, which present a variety of factual elements resembling those of petitioner's case, juries chose to convict the defendants of less than first degree murder. In some of these cases, the lesser convictions were reversed on appeal for trial errors which, when corrected, might have produced dispositions even more favorable to the defendants.

Second Degree Murder Convictions

State v. Cole, 280 N.C. 398, 185 S.E.2d 833 (1972).
State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971), *aff'd on remand*, 17 N.C. App. 239, 193 S.E.2d 475 (1972).
State v. Fields, 279 N.C. 460, 183 S.E.2d 666 (1971).
State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).
State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971).
State v. Kirby, 273 N.C. 306, 160 S.E.2d 24 (1968).
State v. Feaganes, 272 N.C. 246, 158 S.E.2d 89 (1967).
State v. Barber, 270 N.C. 222, 154 S.E.2d 104 (1967).
State v. Johnson, 270 N.C. 215, 154 S.E.2d 48 (1967).
State v. Kea, 256 N.C. 492, 124 S.E.2d 174 (1962).
State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960).
State v. Wagoner, 249 N.C. 637, 107 S.E.2d 83 (1959).
State v. Morgan, 245 N.C. 215, 95 S.E.2d 507 (1956).
State v. Wingler, 238 N.C. 485, 78 S.E.2d 303 (1953).
State v. Russell, 233 N.C. 487, 64 S.E.2d 579 (1951).
State v. Taylor, 226 N.C. 286, 37 S.E.2d 901 (1946).

State v. Miller, 223 N.C. 184, 25 S.E.2d 623 (1943).
State v. Terrell, 212 N.C. 145, 193 S.E. 161 (1937).
State v. Godwin, 211 N.C. 419, 190 S.E. 761 (1937).
State v. Holland, 193 N.C. 713, 138 S.E. 8 (1927).
State v. Brinkley, 183 N.C. 720, 110 S.E. 783 (1922).
State v. Evans, 177 N.C. 564, 98 S.E. 788 (1919).
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State v. Gladden, 279 N.C. 566, 184 S.E.2d 249 (1971).
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State v. Benge, 272 N.C. 261, 158 S.E.2d 70 (1967).
State v. Price, 271 N.C. 521, 157 S.E.2d (1967).
State v. Miller, 267 N.C. 409, 148 S.E.2d 279 (1966).
State v. Camp, 266 N.C. 626, 146 S.E.2d 643 (1966).
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State v. Davis, 259 N.C. 138, 129 S.E.2d 894 (1963).
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State v. Marshall, 208 N.C. 127, 179 S.E. 427 (1935).
State v. Bost, 192 N.C. 1, 133 S.E. 176 (1926).
State v. Jones, 188 N.C. 142, 124 S.E. 121 (1924).
State v. Baldwin, 184 N.C. 789, 114 S.E. 837 (1922).
State v. Carraway, 181 N.C. 561, 107 S.E. 142 (1921).
State v. Davis, 175 N.C. 723, 95 S.E. 48 (1918).
State v. Hand, 170 N.C. 703, 86 S.E. 1005 (1915).
State v. Pollard, 168 N.C. 116, 83 S.E. 167 (1914).
State v. Yates, 155 N.C. 450, 71 S.E. 317 (1911).
State v. Rowe, 155 N.C. 436, 71 S.E. 332 (1911).

State v. Hough, 138 N.C. 663, 50 S.E. 709 (1905).
State v. Sumner, 130 N.C. 718, 41 S.E. 803 (1902).
State v. Walker, 22 N.C. App. 22, 205 S.E.2d 328 (1974).
State v. Barrett, 20 N.C. App. 419, 201 S.E.2d 553 (1974).
State v. Davis, 18 N.C. App. 436, 197 S.E.2d 6 (1973).
State v. Brice, 17 N.C. App. 189, 193 S.E.2d 299 (1972).
State v. Lynn, 16 N.C. App. 566, 192 S.E.2d 608 (1972).
State v. Jefferies, 16 N.C. App. 235, 192 S.E.2d 104 (1972).
State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972).
State v. Edwards, 8 N.C. App. 296, 174 S.E.2d 28 (1970).
State v. Clontz, 6 N.C. App. 587, 170 S.E.2d 624 (1969).
State v. Hurdle, 5 N.C. App. 610, 169 S.E.2d 17 (1969).
State v. Hardee, 3 N.C. App. 426, 165 S.E.2d 43 (1969).

APPENDIX D

WORLDWIDE TRENDS IN THE USE OF THE DEATH PENALTY

In a report for the United Nations Department of Economic and Social Affairs describing developments in the use of the death penalty during the years 1961 to 1965, Professor Norval Morris summarized his findings as follows:

> ". . . [t]here is an over-all tendency in the world towards fewer executions. This is the result of less frequent use of the death penalty in those States whose statutes provide for that penalty, and of a steady movement towards legislative abolition of capital punishment."[1d]

In a 1971 supplemental report to the Economic and Social Council, the Secretary-General of the United Nations concluded:

> ". . . [t]here is still a clear trend towards total abolition. Most countries are gradually restricting the number of offences for which the death penalty can be applied and a few have totally abolished capital offences even in wartime. Those countries retaining the death penalty report that in practice it is only exceptionally applied and frequently the persons condemned are later pardoned by executive authority. . . ."[2d]

[1d]UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) 81-82 (1968) [hereafter cited as UNITED NATIONS].

[2d]UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, Capital Punishment (E/4947) 3 (February 23, 1971) [hereafter cited as Secretary-General's Note].

A variety of factors hamper somewhat any attempt to generalize upon the data summarized by these statements. No study has successfully sought data from all jurisdictions competent to retain or abolish capital punishment; many otherwise abolitionist jurisdictions retain the death penalty for extraordinary offenses or emergency circumstances; several jurisdictions have failed to reflect *de facto* abolition in positive law.[3d] A consideration of trends over the last two centuries, moreover, is complicated by the movements of several jurisdictions which have abolished the death penalty and subsequently reintroduced it.

Nonetheless, when these vacillating movements are put out of account by focusing upon countries which have abolished capital punishment and never restored it (and when "abolition" is used to mean the termination of capital punishment for the ordinary violent civilian crimes: murder, rape, robbery, arson, and kidnaping), definite historical trends are clearly apparent.

Table I lists abolitionist jurisdictions outside the United States by year of *de jure* abolition, except for Lichtenstein, Luxembourg, Nicaragua, and Surinam, for which the last execution year is given to mark the beginning of *de facto* abolition.[4d]

[3d]*See* UNITED NATIONS 8-9; Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L., CRIM. & POL. SCI. 397, 405 (1965) [hereafter cited as Patrick].

[4d]Nine of the listed jurisdictions retain execution as the penalty for certain extraordinary civil offenses (the four Australian jurisdictions, Canada, Israel, Nepal, New Zealand, and United Kingdom); eight permit the death penalty in wartime or under military law (Brazil, Denmark, Finland, Italy, Netherlands, Norway, Sweden and Switzerland); and two executed Nazi collaborators after World War II (Netherlands and Norway).

TABLE I[5d]

Worldwide Abolition

ARGENTINA	1922	LICHTENSTEIN	1798[7d]
AUSTRALIA (Federal)	1945	LUXEMBOURG	1821[7d 9d]
New South Wales	1955	MEXICO (Federal)	1931
Queensland	1922	29 of 32 States	1931-1970
Tasmania	1968	MONACO	
AUSTRIA	1968	MOZAMBIQUE	1867
BELGIUM	1863[6d]	NEPAL	1950
BOLIVIA	1961	NETHERLANDS	1886
BRAZIL	1946	Antilles	1957
CANADA	1967[8d]	NEW ZEALAND	1961
COLUMBIA	1910	NICARAGUA	1892[7d]
COSTA RICA	1880	NORWAY	1905
DENMARK	1930	PANAMA	1915
DOMINICAN REPUBLIC	1924	PORTUGAL	1867
EUCADOR	1897	SAN MARINO	1848
FINLAND	1949	SURINAM	1927[10d]
GERMANY, West	1949	SWEDEN	1921
GREENLAND	1954	SWITZERLAND	1942
HONDURAS	1957	UNITED KINGDOM	
ICELAND	1940	Great Britain	1965
INDIA		Northern Ireland	1966
Travencore	1944	URUGUAY	1907
ISRAEL	1954	VATICAN CITY STATE	
ITALY	1944	VENEZUELA	1863

[5d] Sources for this table are: UNITED NATIONS; Secretary-General's Note; ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES (Council of Europe, European Committee on Crime Problems, 1962) [hereafter cited as ANCEL]; JOYCE, CAPITAL PUNISHMENT: A WORLD VIEW (1961); UNIVERSITY OF COIMBRA, FACULTY OF LAW, PANA DE MORTE (1967); Patrick.

[6d] Excludes one soldier executed in 1918.

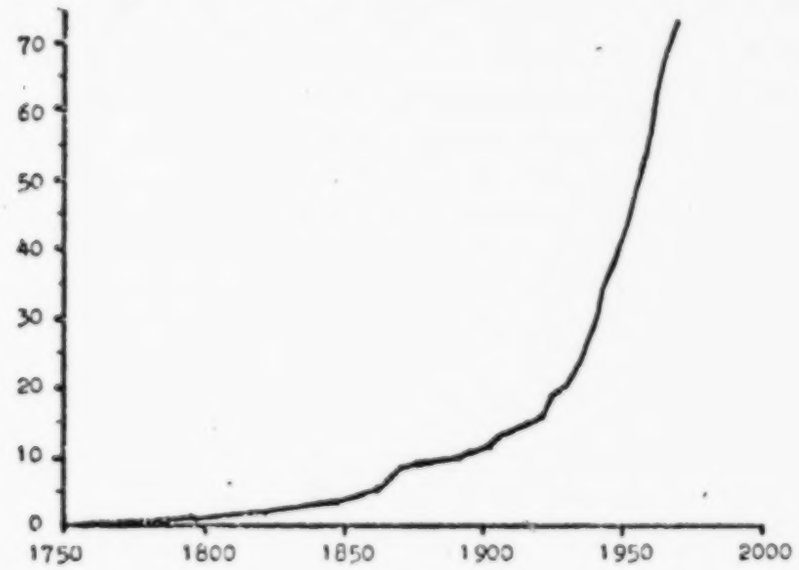
[7d] *De facto* only; date is last execution.

[8d] Statute abolishing capital punishment for murder expires in 1977 if not renewed.

[9d] Excludes one.

[10d] Excludes one.

Chart I displays the data contained in Table I. Although, as of 1970, abolitionist jurisdictions comprised far less than half of all the nations of the world, there is evidence of a definite, continuing, long-term, accelerating, worldwide trend toward ending the use of the penalty of death. Every decade since 1800 has shown growth in the total number of abolitionist jurisdictions; and during the past century the number of jurisdictions abandoning capital punishment in any given decade has been greater than the number in the preceding decade.



Actual use of the death penalty is exceedingly rare.[11d] Estimates of the total number of executions in the world today must necessarily remain speculative, but the figure probably does not much exceed the 560 executions estimated to have occurred in London and

[11d] Patrick, whose execution figures appear to be somewhat high (*see* note 12d *infra*), found that out of 89 countries which made legal provision for the death penalty during the period 1958-1962, there were 36 which executed not a single human being through the five-year period. Patrick 409. *See also* UNITED

(continued)

Middlesex alone each year during the mid-sixteenth century.[12d] These figures are assuredly very crude, but in general terms they mark the magnitude of the trend

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NATIONS 96. Patrick reports 13 additional countries which conducted fewer than one execution per year; 24 countries which conducted one to five executions; 10 countries which conducted between fifty and one hundred executions. Patrick 409. The Republic of South Africa appears to be the known world leader in executions, averaging about one hundred per year. Kahn, *The Death Penalty in South Africa*, 18 TYDKSKRIF VIR HEDEND-AAGES ROMEINS-HOLLANDSE REG. 108, 116-118 (1970) [hereafter cited as Kahn].

[12d]The derivation of the average annual figure of 560 for the last decade of the reign of Henry VIII and throughout the reign of Edward VI is set forth in 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 142 n.20 (1948).

An annual average total of about 535 executions is reported for the period 1958-1962 by Patrick, for the major capital-punishment countries of the world, excluding the communist nations and eleven non-communist nations (some of them relatively populous). Patrick 408. However, there are reasons to believe that this figure is inaccurately large. Where there is overlapping between the numbers of executions reported by Patrick and the presumably more reliable numbers gathered by the United Nations Department of Economic and Social Affairs for the two periods 1956-1960 and 1961-1965, Patrick's figures are consistently higher. *See* UNITED NATIONS 43-44,96-97. The two reports may be consistent, of course, if executions peaked strongly in the middle of the 1956-1965 period, but there is no reason to suppose such a peaking. Second, Patrick does not disclose the terms of his inquiries to his correspondents; and it is entirely possible that his reports include executions in political and military

(continued)

toward *de facto* abolition.[13d]

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contexts which should be put out of account for present purposes. Third (a relatively small matter), Patrick's own columnar figures do not total to 535.3, as he says, but to 517.1. Patrick 398-404.

In any event the figures today are almost certainly lower than those for 1962-1963. The United States contributed 48.6 executions per year to Patrick's total, *id.* at 404; and we know that there have been no executions in this country since 1967. Among the nations reporting to the United Nations for both the 1956-1960 and the 1961-1965 periods, there was a sharp decline in executions from the first to the second period (UNITED NATIONS 96-97); a number of nations have abolished capital punishment *de jure* since 1962; and the only country in the world where it is definitively known that executions have been on the increase is the Republic of South Africa (Kahn, 116; *and compare* Van Niekerk, *The Administration of Justice, Law Reform and Jurisprudence*, [1967] ANNUAL SURVEY OF SOUTH AFRICAN LAW 444, 471-472, *with* Patrick). Projecting the 40% decrease found in the United Nations figures for countries which reported during both of its reporting periods, and assuming that the extent to which American executions have exceeded the 40% rate more than offsets the increase in South Africa, there would be fewer than 200 executions a year today in the countries studied by Patrick. We would have to nearly treble that figure, in consideration of the communist and eleven non-communist countries—surely a generous allowance—in order to bring the world total to 560.

[13d]*See* ANCEL 12: "Abolition in law has in almost all cases been preceded by abolition in practice. . . ."

APPENDIX E

THE EVIDENCE CONCERNING THE DETERRENT EFFICACY OF THE DEATH PENALTY

This appendix describes the findings of the numerous studies conducted during recent decades concerning the deterrent efficacy of capital punishment. Part A sets forth the conclusions of social scientists who have tested statistically the hypothesis that capital punishment is superior to imprisonment as a deterrent of the crime of murder. Part B evaluates the anecdotal impressions of law enforcement officers on the same subject.

A. The Statistical Evidence

It is no exaggeration to report that scientific studies of the deterrent effect of capital punishment speak with rare and compelling unanimity. Recent studies are presaged by the conclusions of George B. Vold in 1932 that "the death penalty does not and can not prevent crime either specifically in regard to murder or more generally in regard to other kinds of crime,"[1e] and Robert H. Dann in 1935 that "the homicide rate can never be materially affected, one way or the other, by the present program of executions. . . ."[2e]

[1e]Vold, *Can the Death Penalty Prevent Crime?*, 12 PRISON J. (No. 4) 4, 9 (1932).

[2e]Dann, *The Deterrent Effect of Capital Punishment*, FRIENDS SOCIAL SERVICE SERIES, Bulletin No. 29 (Third Month) 19 (1935).

A number of post-war studies were based on the data collected during the intensive efforts of the British Royal Commission on Capital Punishment, between 1949 and 1953.[3e] That data led all informed students of the subject to conclude: "it is not true to say that capital punishment is in practice a greater deterrent than other forms of severe punishment."[4e] The conclusion of the Commission itself, confined as it was by its limited terms of reference, was: "[i]t is . . . important . . . not to base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty."[5e] And the Commission carefully noted that "it is impossible to arrive confidently at any firm conclusion about the deterrent effect of the death penalty, or indeed of any form of punishment."[6e] But this caution and its technically delimited conclusion do not obscure the Commission's assessment of the statistical evidence before it:

> ". . . [we] agree with Professor Sellin that the only conclusion which can be drawn from the figures is that there is no clear evidence of any influence of the death penalty on the homicide

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[3e]*See* ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT (H.M.S.O. 1953) [Cmd. 8932] [hereinafter cited as ROYAL COMMISSION].

[4e]GARDINER, CAPITAL PUNISHMENT AS A DETERRENT: AND THE ALTERNATIVE 31 (1956). *Accord:* GOWERS, A LIFE FOR A LIFE 138 (1956); Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U.L.REV. 433, 458 (1957). *See also* KOESTLER, REFLECTIONS ON HANGING 59 (Amer. ed. 1957).

[5e]ROYAL COMMISSION 24.

[6e]*Ibid.*

rates of these States [principally neighboring abolitionist and retentionist jurisdictions of the United States, systematically studied by Sellin] and that, 'whether the death penalty is used or not and whether executions are frequent or not, both death-penalty States and abolition States show rates which suggest that these rates are conditioned by other factors than the death penalty.' "

"... [t]he general conclusion which we have reached is that there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall."[7e]

The conclusion of the more recent study made under the auspices of the European Committee on Crime Problems of the Council of Europe is in full accord with the Royal Commission's findings. "Even a cursory examination of the statistics on the subject for [Council of Europe]. . .countries shows that they give no positive indication regarding the value of capital punishment as a deterrent".[8e]

Contemporary criminologists who have studied deterrence and the death penalty in the United States speak with one voice in summarizing their conclusions from the evidence:

"Capital punishment has had no appreciable influence on the murder rate in the states which have been investigated."[9e]

[7e] *Id.* at 23.

[8e] ANCEL, THE DEATH PENALTY IN EUROPEAN COUNTRIES 45-46.(Council of Europe, European Committee on Crime Problems, (1962)).

[9e] Andenaes, *Does Punishment Deter Crime?* 11 CRIM. L. Q. 76, 83 (1968).

"Capital punishment does not act as an effective deterrent to murder."[10e]

"Capital punishment is ineffective in deterring murder."[11e]

"The use or non-use of capital punishment has no effect on the number of murders committed within a state or the nation."[12e]

"The evidence indicates that [the death penalty for murder]. . .has no discernible effects in the United States."[13e]

"Statistical findings and case studies converge to disprove the claim that the death penalty has any special deterrent value."[14e]

"The death penalty, as we use it, exercises no influence on the extent or fluctuating rates of capital crimes."[15e]

"The studies [of capital punishment] suggest no discernible relationship between the presence of the death penalty and homicide rates."[16e]

[10e] Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WISC. L. REV. 703,706.

[11e] Doleschal, *The Deterrent Effect of Legal Punishment: A Review of Literature*, 1 INFORMATION REVIEW ON CRIME & DELINQ.(No. 7)7 (1969).

[12e] LUNDEN, THE DEATH PENALTY 22 (1960).

[13e] Reckless, *The Use of the Death Penalty–A Factual Statement*, 15 CRIME & DELINQ. 43, 52 (1969).

[14e] Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 62 (1952).

[15e] SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959) 63 [hereafter cited as SELLIN (1959)].

[16e] ZIMRING, PERSPECTIVES ON DETERRENCE 17 (Nat'l Institute of Mental Health, January 1971).

"The capital punishment controversy has produced the most reliable information on the general deterrent effect of a criminal sanction. It now seems established and accepted that . . . the death penalty makes no difference to the homicide rate."[17e]

These general conclusions rest upon the following results of statistical inquiries into specific aspects of the deterrence question:

Death penalty jurisdictions do not have a lower rate of criminal homicide than abolition jurisdictions.[18e]

Given two states otherwise similar in factors that might affect homicide rates, and differing in that one employs capital punishment while the other does not, the abolition state does not show any consistently higher rate of criminal homicide.[19e]

Jurisdictions which abolish the death penalty do not therefore show an increased rate of criminal homicide.[20e]

Jurisdictions which reintroduce the death penalty after having abolished it do not show a

[17e]Morris and Zimring, *Deterrence and Corrections*, 381 ANNALS 137, 143 (1969).

[18e]Schuessler, *supra* note 14e, at 57; Reckless, *supra* note 13e, at Table 9.

[19e]SELLIN (1959) 23-24; SELLIN, CAPITAL PUNISHMENT 135-138 (1967) [hereafter cited as SELLIN (1967)].

[20e]FATTAH, A STUDY OF THE DETERRENT EFFECT OF CAPITAL PUNISHMENT WITH SPECIAL REFERENCE TO THE CANADIAN SITUATION (Department of the Solicitor General, Canada, Research Centre Report No. 2, 1972) [hereafter cited as FATTAH]; SELLIN (1959) 34-38. SELLIN (1967) 122-124; Samuelson, *Why Was Capital Punishment Restored in Delaware?*,60 J. CRIM. L., CRIM. & POL. SCI. 148, 150-151 (1969).

decreased rate of criminal homicide after reintroduction.[21e]

Police officers on duty do not suffer a higher rate of criminal assault and homicide in abolition jurisdictions than in death penalty jurisdictions.[22e]

Prisoners and prison personnel do not suffer a higher rate of criminal assault and homicide from life-term prisoners in abolition jurisdictions than in death penalty jurisdictions.[23e]

A post-*Furman* investigation of the operation of mandatory death penalty provisions in "all jurisdictions for which homicide rates are available for at least three years before and after the change from mandatory to discretionary capital punishment for murder" "found no indication that the mandatory death penalty was a more effective deterrent of homicide than discretionary capital punishment."[24e]

[21e]SELLIN (1959) 34-38; SELLIN (1967) 122-124; Samuelson, note 20e *supra*, at 150-151.

[22e]Sellin, *Does the Death Penalty Protect Municipal Police?*, in BEDAU, THE DEATH PENALTY IN AMERICA 294-301 (rev. ed. 1967) [hereafter cited as BEDAU]; Campion, *Does the Death Penalty Protect the State Police?*, in BEDAU 301-315.

[23e]MASSACHUSETTS SPECIAL COMMISSION ESTABLISHED FOR THE PURPOSE OF INVESTIGATING AND STUDYING THE ABOLITION OF THE DEATH PENALTY IN CAPITAL CASES, REPORT AND RECOMMENDATIONS 21-22 (1958); SELLIN (1967) 154-160; Sellin, *Homicides and Assaults in American Prisons, 1964*, 31 ACTA CRIMINOLOGIAE ET MEDICINAE LEGALIS JAPONICA 139 (1965).

[24e]BOWERS, EXECUTIONS IN AMERICA 160 (1974).

B. Impressions of Law Enforcement Officers

Law enforcement officers frequently dismiss the statistical evidence set forth above because they say that it fails to prove that the threat of capital punishment never deterred a murder which would have occurred if imprisonment had been the only risk run by the murderer.[25e] Police spokesmen invariably base their own belief in the deterrent efficacy of the death penalty entirely upon impressionistic bases,[26e] and upon the quoted statements of criminals (made to police officers following their arrests) claiming that they carried toy guns in robberies out of fear of the death penalty.[27e] It would be improper, certainly, to reject the intuitions of the police out of hand, or to assert categorically that the fear of death never has dissuaded any putative murderer from his crime. However, several circumstances render these police opinions gravely suspect as a foundation for the present-day American use of death as a penalty for first-degree murder.

First, correctional officials, whose knowledge of criminal offenders is at least as informed as that of the police, generally do not believe that the death penalty

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[25e] *E.g.*, Hoover, *Statements in Favor of the Death Penalty*, in BEDAU 130; Allen, *Capital Punishment: Your Protection and Mine*, in BEDAU 135.

[26e] *See* ROYAL COMMISSION 18-24; CANADA, JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON CAPITAL AND CORPORAL PUNISHMENT AND LOTTERIES; REPORT ¶¶29-33, 43-50 (1956); NEW JERSEY, COMMISSION TO STUDY CAPITAL PUNISHMENT, REPORT 8-9 (1964).

[27e] *E.g.*, Desky, *Should Capital Punishment be Abolished in California?*, 39 THE COMMONWEALTH 19, 23 (November 11, 1963).

is a superior deterrent to imprisonment.[28e] They and other knowledgeable observers agree that a very large proportion of the crimes which are defined by law as first-degree murders and made punishable by death are not the product of rational choice which the threat of the extreme penalty can deter.[29e] Second, when a murder *is* the product of rational choice in the sense that it can be affected by the threat of punishment, the threat of death punishment is so attenuated by its uncertainty as to become minimally significant.[30e] Third, the number of "toy gun" incidents and similar cases in which criminals assert that their behavior was affected by the threat of the death penalty remains

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[28e] DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 257 (1962); Testimony of Clinton T. Duffy, in *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess., on S.1760, *To Abolish the Death Penalty* (March 20-21 and July 2, 1968) 22-23 (G.P.O. 1970) [hereafter cited as *Hearings*]; Thomas, *Attitudes of Wardens Toward the Death Penalty*, in BEDAU 242. *And see* National Council on Crime and Delinquency, Board of Trustees, *Policy Statement on* Capital Punishment, 10 CRIME & DELINQ. 105 (1964).

[29e] LAWES, LIFE AND DEATH IN SING SING 144-145 (1928); Testimony of Clinton T. Duffy, in *Hearings*, at 23; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN 256 (1962); *see* WEIHOFEN, THE URGE TO PUNISH 150-152 (1956); PLAFAIR & SINGTON, THE OFFENDERS 228 (1957); Statement of Attorney General Ramsey Clark, in *Hearings*, at 92; Ancel, *The Problem of the Death Penalty* in SELLIN (1967) 3, 17; (1967); Sellin, *The Inevitable End of Capital Punishment*, in SELLIN (1967) 239, 249-250; McNamara, *Statement Against Capital Punishment*, in BEDAU 182, 185-185; Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54, 61-62 (1952); Caldwell, *Why Is The Death Penalty Retained?*, 284 ANNALS 45, 51 (1952).

[30e] *See* WEIHOFEN, THE URGE TO PUNISH 159-164 (1956); BEDAU 270.

uncounted, but (even if the reports are reliable)[31e] these cases must be few, since they register no impact upon any known comparison of homicide rates in abolition and death-penalty jurisdictions or eras. See Part A, *supra*. Of course, it may be that such cases are offset by the equally unknown number of instances of the clinically documented converse phenomenon of "suicide-by-homicide": that is, the cases of killers who kill in order to force society to kill them in return.[32e] In any event, one thing seems plain. The police impressions and anecdotes do not point to any factor, unaccounted for by the statistical studies, which would explain why the studies consistently fail to reflect appreciable deterrent effects of the death penalty if they exist.

Finally, when inmates were examined in an experimental context by psychiatrists rather than by law enforcement officers, (and thus without substantial danger that the interviews were distorted by implicit coercive influences) quite different opinions were expressed:

[31e]They seem unlikely to be very reliable, since an arrested man will understandably tell a policeman what he thinks the policeman wants to hear. *See* Testimony of Clinton T. Duffy, in *Hearings*, at 23.

[32e]West, *Medicine and Capital Punishment*, in *Hearings*, at 124, 126-127; SELLIN (1959) 65-69; BEDAU 264 n.7; Gold, *Suicide, Homicide, and the Socialization of Aggression*, 63 AM. J. SOCIOLOGY 651 (1958); Neiberg, *Murder and Suicide*, 4 ARCH. CRIM. PSYCHODYNAMICS 253 (1961); OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT No. 46, CAPITAL PUNISHMENT 49 (1961); FATTAH 39-40.

"[t]he population interviewed gave no support to the concept that capital punishment deters major crime."[33e]

[33e]Pakola & Sadoff, *Capital Punishment: A Deterrent for Major Crime?*, in GOVERNOR'S STUDY COMMISSION ON CAPITAL PUNISHMENT, REPORT 115, 126-127 (Commonwealth of Pennsylvania 1973).

Supreme Court, U. S.
FILED
FEB 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

THE STATE OF NORTH CAROLINA

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR RESPONDENT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Preamble of the Constitution of the United States which provides:

> "We the people . . . in order to . . . insure domestic tranquility . . . do ordain and establish this Constitution . . . . "

Article IV, Section 4 of the Constitution of the United States which provides:

> "The United States shall guarantee to every State in this Union a Republican[1] form of Government . . . . "

---

1 "Republic, commonwealth, a popular state or

Article V of the Constitution of the United States which provides:

> " . . . Amendments, . . . shall be valid to all intents and purposes, as part of this Constitution . . . . "

The Fifth Amendment to the Constitution of the United States which provides:

> No person shall be held to answer for a capital . . . crime,[2] unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property without due process of law; . . . . "

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government; or a nation where the people have the government in their own hands." Vol. III, ENCYCLOPAEDIA BRITANNICA: or A DICTIONARY OF ARTS AND SCIENCES, 548, 1st Ed. (1771)

"republic, n. 1. a state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen . . . by them." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged, 1218 (1966)

2 "capital crime, such a one as subjects the criminal to capital punishment, that is, the loss of life." Vol. II, ENCYCLOPAEDIA BRITANNICA; or, A DICTIONARY OF ARTS AND SCIENCES, 1st Ed. (1771)

"Capital punishment is the execution of a criminal pursuant to a sentence of death imposed by a competent court." Vol. IV, ENCYCLOPAEDIA BRITANNICA (1969 Ed.)

"capital, adj. . . . 14. involving the loss of life: *capital punishment.* 15. punishable by death: *a capital crime; a capital offender.*" THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged Ed., 219 (1966)

The Sixth Amendment to the Constitution of the United States which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury . . . . "

The Eighth Amendment to the Constitution of the United States which provides:

> " . . . (C)ruel and unusual punishments (shall not) be inflicted."

The Tenth Amendment to the Constitution of the United States which provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Fourteenth Amendment to the Constitution of the United States which provides:

> " . . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law; . . . . "

Article I, Section 1 of the Constitution of North Carolina which provides:

> " . . . (A)ll persons are created equal; that they are endowed by their Creator with certain inalienable rights; . . . among these are life, (and) liberty . . . . "

Article I, Section 18 of the Constitution of North Carolina which provides:

> "All courts shall be open to every person for an injury done him in his . . . person . . . and shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

Article I, Section 19 of the Constitution of North Carolina which provides:

> "No person shall be taken, imprisoned, . . . or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion or national origin."

Article I, Section 22 of the Constitution of North Carolina which provides:

> " . . . (N)o person shall be put to answer any criminal charge but by indictment . . . . "

Article I, Section 24 of the Constitution of North Carolina, which provides:

> "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court . . . . "

Article I, Section 27 of the Constitution of North Carolina which provides:

> "Excessive bail shall not be required . . . nor cruel or unusual punishments inflicted."

Article III, Section 5(b) of the North Carolina Constitution, which provides:

> "(T)he Governor may grant reprieves, commutations, and pardons, after conviction, for all offenses . . . . "

Article IV, Section 18(1) of the North Carolina Constitution, which provides:

> " . . . A District Attorney shall be chosen for a term of four years by the qualified voters . . . . "

Article XI. Section 2 of the North Carolina Constitution which provides:

> " . . . (M)urder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact."

North Carolina General Statute Section 11-1, which provides:

> "Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity."

North Carolina General Statute Section 11-2, which provides:

> "Judges . . . and other persons who may be empowered to administer oaths, shall . . . require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head."

North Carolina General Statute Section 11-6, which provides:

> *"Oath to support Constitution of United States; all officers take.*–All members of the General Assembly, and all officers who shall be elected or appointed to any office of trust or profit within the State, shall, agreeably by act of Congress, take

the following oath or affirmation: *'I, A.B., do solemnly swear that I will support the Constitution of the United States; so help me, God.'*; which oath shall be taken before they enter upon the execution of the duties of the office."

North Carolina General Statute Section 11-7, which provides:

> *"Oath or affirmation to support State Constitution; all officers to take.*–Every . . . person who shall be chosen or appointed to hold any office of trust or profit in the State, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation: *'I, A.B., do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me, God.'"*

North Carolina General Statute Section 14-230, which provides:

> *"Willfully failing to discharge duties.* If any . . . official of any State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court."

North Carolina General Statute Section 14-17, which provides:

> "A murder (in the first degree) . . . shall be punished with death."[3]

North Carolina General Statute Section 15-187, which provides:

> " . . . (D)eath by the administration of lethal gas (is) substituted (for death by electrocution)."

North Carolina General Statute Section 15- 188, which provides:

> "The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead . . . . "

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[3] As interpreted by the North Carolina Supreme Court in *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973) set forth in full text herein as Appendix A, reaffirmed in *State v. Jarrette*, 284 N.C. 670, 202 S.E.2d 750 (1974), set forth in full text herein as Appendix B; and as reenacted by the General Assembly of North Carolina on April 8, 1974.

QUESTIONS PRESENTED[4]

I

IS CAPITAL PUNISHMENT, IN AND OF ITSELF, CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

II

DOES THE ADMITTED EXISTENCE OF THE INESCAPABLE FACT THAT APPROPRIATE PUBLIC OFFICIALS MUST IN GOOD FAITH, ACCORDING TO LAW AND THEIR OATHS OF OFFICE, USE THEIR HUMAN JUDGMENT AT THE PROSECUTORIAL STAGE, THE VERDICT STAGE AND POST JUDICIAL STAGE, IN AND OF ITSELF, BRING NORTH CAROLINA'S MANDATORY DEATH PENALTY FOR FIRST

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4 Petitioner states the two questions as a single question. However, careful analysis of the argument presented by petitioner reveals there are two separate and distinct questions raised. They are delineated and defined herein. Both are narrow legal questions involving *per se* rules of law and do not involve factual questions or *as applied*, principles of law.

Query whether Petitioner's brief has raised an additional question or changed the substance of the question already presented which is not in accord with Rule 40-1(d)(2) of the Supreme Court Rules. Respondent was under the impression Petitioner presented only the question of whether capital punishment *per se* violates the Eighth Amendment to the Constitution of the United States. Regardless, Respondent has addressed itself to both questions presented in Petitioner's brief and it may well be desirable for the Court to give a definitive answer to both.

DEGREE MURDER AND RAPE WITHIN THE PROHIBITIONS OF THE *FURMAN*[4a] DECISION?

STATEMENT OF THE CASE

Petitioner, a black man, armed with a .38 caliber pistol on a Sunday afternoon, stalked and shot to death John Griffin, a black man, who at the time was sick, unarmed, and on a public street visiting with two of his pre-teenaged daughters (App. p 8, ROA p. 16).

Upon indictment for first degree murder by the Grand Jury, Petitioner was prosecuted for that capital crime by the District Attorney in a trial to a jury of twelve.

The trial judge, a publicly elected official of the judicial branch of the government of North Carolina, charged the jury that it could return one of four possible verdicts: Guilty of first degree murder; Guilty of second degree murder; Guilty of voluntary manslaughter; or Not guilty. (Appendix pp. 69-84, ROA 100-122).

The jury rendered its unanimous verdict of guilty of first degree murder in open court (Appendix pp. 4-5, ROA pp. 4-9), and upon polling the jury, which was impaneled according to law, each juror was satisfied beyond a reasonable doubt that petitioner was guilty of first degree murder, (Appendix pp. 84-85, ROA 123-124).

There is no contention by Petitioner here, that the evidence was insufficient to support the verdict.

Following appropriately determined North Carolina law making death the only permissible punishment for first degree murder, Petitioner was sentenced to death to be induced by inhalation of lethal gas, (Appendix pp. 6 and 7, ROA 9-12).

Petitioner, upon review by the North Carolina Supreme Court, claimed that his sentence of death was cruel and unusual and therefore prohibited by the Eighth and Fourteenth

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4a *Furman v. Georgia*, 408 U.S. 238 (1972)

Amendments to the Constitution of the United States, and the Constitution of North Carolina, (Appendix p. 103).

The North Carolina Supreme Court rejected Petitioner's contention, and affirmed his conviction and sentence, (Appendix p. 104).

On October 29, 1974, this Court granted Petitioner's petition for a writ of certiorari to the North Carolina Supreme Court to review that decision and question.

HOW THE CONSTITUTIONAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

Petitioner's first question raised below was that:

> " . . . (T)he death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19, and 24 of the Constitution of the State of North Carolina." (Appendix p. 88, ROA 131).

Petitioner's second question raised below was that:

> "He further contends that capital punishment in North Carolina is still imposed in a selective and arbitrary manner, in violation of *Furman v. Georgia*, 408 U.S. 238, (1972)." Appendix p. 103).

The North Carolina Supreme Court rejected both contentions and affirmed Fowler's sentence of death (Appendix p. 104).

SUMMARY OF ARGUMENT

The purposes of government are set forth in the Preamble. Insuring "domestic tranquility" is coequal in importance to providing "for the common defense."

Just as the sovereign has delegated the power to its governing officials to "make war" and thus send some of its *finest* to a certain death to thwart a perceived threat to the nation from *without*, it has delegated the power to its governing officials to send its *worst* to a certain death to thwart a perceived threat to the nation's tranquility from *within*. Respondent has determined the crimes of first degree murder and first degree rape constitute such a grave threat.

The Constitutional limitations which do exist with regard to war are how it shall be made (Congress to declare and the President to be Commander in Chief).

Likewise, the Constitutional limitations which do exist with regard to capital punishment are in the manner by which the sentence is arrived at (due Process), and the manner by which it is carried out (non-discriminatory and not cruel and unusual).

Public officials performing their constitutional duties do not have an unbridled discretion at any stage of proceedings in a capital case, but are limited by law, evidence and their sacred oaths of office to exercise their *judgment, vis-a-vis discretion*, in accordance with law.

ARGUMENT

I

Introduction

Respondent will divide its introductory remarks into two segments: A. A statement on matters which are not controverted by Respondent though dwelt upon at length in Petitioner's "brief"; and B. Corrections of erroneous statements in Petitioner's "brief."

A. MATTERS NOT CONTROVERTED BY RESPONDENT.

1. Petitioner is a human being and most humans desire to live.

Many pages of Petitioner's encyclopaedic "brief" seem to have no purpose other than to depict Petitioner as a human being. The State so stipulates.

2. Additionally, Petitioner devotes many pages of his brief depicting the fact that those in prison awaiting a death sentence find it restrictive of their physical, mental and emotional being and generally, that death row is an undesirable place to be. The State so stipulates and affirmatively shows unto the Court that it specifically means for its death row to be a place of maximum security, and knows of no way it can provide a place of maximum security without concommitantly restricting a prisoner's mental and emotional self.

3. The prolonged period of time a person must await his execution and the concommitant unpleasant circumstances surrounding the wait is caused by the repetitive reviews of state Supreme Court decisions by one Judge federal district courts and three Judge federal appeals courts, not by the Respondent State's Courts. The State can and does meet the constitutional mandate of a speedy trial, as well as providing an Appellate review as of right by the State's highest court of review.[5]

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5 The chronology at page 1 of the Appendix demonstrates that nine months and ten days lapsed from the date of the murder until Respondent's Supreme Court had completed its review of the case and rendered its judgment.

Respondent considers its court to consist of seven Justices who are as mature, learned in the law, judicious, circumspect and dedicated to constitutional principles of free government as any federal Judge.

Thus the respondent State's government is not the causative agent for the complained of period spent by petitioner awaiting execution.

4. Respondent stipulates that the Governor of North Carolina does have the power to grant pardons and clemency to prisoners in the State's prisc d affirmatively shows that this Court has held this to be an unreviewable power in the hands of the chief executive.[6]

5. Respondent stipulates that its District Attorneys have the duty to exercise their respective judgments as to what crime the State's evidence warrants prosecuting, but shows unto the Court this judgment is a prerequisite to the carrying out of his constitutional duty, but the District Attorney's judgment must be exercised in accordance with law.

6. Respondent stipulates that its juries must exercise their respective judgments as to what crime, if any, the State's evidence has convinced them beyond a reasonable doubt an accused has committed. The respondent shows unto the Court that this exercise of judgment is a prerequisite to the performance of its constitutional duty and must be done in accordance with law.

7. Respondent stipulates that an appreciable[7] or noticeable segment of the population is opposed to capital punishment and that such a noticeable segment has existed during the entire history of North Carolina and the United States, but shows unto the Court that such fact of opposition

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6 *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872)

7 Appreciable. Capable of being readily perceived or estimated . . . (RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged. (1966) at p. 73.

does not make capital punishment "cruel and unusual" any more than the fact that an appreciable or noticeable segment of the population is opposed to abortion makes an abortion a murder.[8] But Respondent notes that this Court has only recently determined that the mother's well-being and right to her life outweigh the right of the fetus to live. To some a fetus is a life in the same sense as is a fully developed man. And to that segment, this Court holds that a woman and her physician may take that totally innocent human life. Does that mean this Court is "arbitrary", "capricious", "discriminatory", or denying the fetus the "equal protection of law"?

Further, to an appreciable segment of society, the manner in which the United States became involved in Vietnam was in direct violation of the Constitution of the United States,[9] and pursuant to Presidential decree some 50,000 of our best have been deprived of their lives.

The Supreme Court, in denying review of those decisions,[10] recognized the power and correlative duty of the Executive and Legislative branches of government to determine when a sufficient threat to this nation's interest exists to warrant military action. It is a certainty that once military action commences, young Americans are doomed to death in an arbitrary manner where "some shall live while others may die."

Why, then, should this Court not recognize the power and duty of the legislative branch to determine when criminal conduct of murder and rape constitutes a sufficient threat to domestic tranquility to warrant the imposition of the death sentence by gas to the murderer and rapist?

8. Respondent stipulates that when all humans die from whatever cause there is a purplish appearance to their faces and fingernails which is commonly termed "cyanosis."

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8 *Roe v. Wade*, 410 U.S. 113 (1973)
Doe v. Bolton, 410 U.S. 179 (1973)

9 United States Constitution, Article I, Section 8, Cls. 1, states "The Congress shall have power . . . to declare war . . . ."

10 *DaCosta v. Laird*, 405 U.S. 979 (1972) and cases there cited, and *Massachusetts v. Laird*, 400 U.S. 886 (1970)

Respondent stipulates that immediately upon death of all human beings the rectal muscles lose their tension and the accumulated gastric pressures in the intestines push the accumulated feces out of the body. Respondent further stipulates that failure of the lungs to furnish oxygen to the blood stream causes all human beings to struggle, writhe, gasp, grasp and their chests to heave mightily to obtain more oxygen, and the eyes appear to bulge in their sockets.

However, Respondent submits that these are normal human reactions, which occur to every conscious person upon failure of the heart or lungs from whatever cause. These reactions are not unique or confined to those put to death by lethal gas.

The term "death throes" is described above and is commonplace.[11] The fact that some may faint upon seeing an execution likewise is not unique or so confined. Numerous people faint upon seeing blood while others who are otherwise hale and hearty men faint when they are about to be immunized with a needle and syringe.

The agony of death described by petitioner at pages 111-114 of his brief seems merciful when compared to the battlefield death. See THE OLD BREED, *A History of the First Marine Division in World War II*, George McMillan, Infantry Journal Press, 1949, at pages 286, 292-293, and 306.

There the author describes first hand accounts of the conditions at page 306:

> "The heat had become an important factor in the fight. A blazing sun, reflected off the white sand and coral, turned the entire arena into a scorching furnace. A few men who had fought desparately for three days in that inferno now began to collapse from heat exhaustion. There were fervent prayers for rain, or at least a cloudy sky

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11 Throe, n. 1. a violent spasm or pang; paroxysm. 2. a sharp attack of emotion. 3. throes, a. any violent convulsion or struggle. b. the agony of death . . . . (RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged, p. 1479 (1966).

to shade the sun. Countless numbers suffered . . . from blistered faces and cracked, bleeding lips. The ragged terrain the regiment had penetrated, with its precipitous slopes on which weary, heavily laden troops expended themselves, contributed to the number of exhaustion victims."

First hand accounts of the death scene are described at pages 286, 292-293:

"I saw a ghastly mixture of bandages, bloody and mutilated skin; men gritting their teeth, resigned to their wounds; men groaning and writhing in their agonies; men out-stretched or twisted or grotesquely transfixed in the attitudes of death; men with their entrails exposed or whole chunks of body ripped out of them . . . .

"There was Graham, snuffed out a hero, lying with four dead Japs around him; and Windsor, flat on his face, with his head riddled by bullets and his arms pointed toward a pillbox where five Japs slumped over a machine gun; and Sharp, curled up on his side, still holding his automatic rifle . . . Stieferman was alive, his face and body peppered by shrapnel . . . .

"I saw McMatt lying on his side with a small hole in his stomach which oozed purple blood. Someone had taken off his clothes. Slowly he turned his head toward me, and I saw that his blue eyes were glassy. He opened his mouth, and his white lips formed a word, but no sound came forth. Exhausted by the effort he let his head slump back and blood was oozing from his mouth.

"LIFE magazine artist Tom Lea in his privately printed book, *Peleliu Landing*," wrote:

"Then I ran–to the right–slanting up the beach for cover, half bent over. Off balance, I fell flat on my face just as I heard the *whishhh* of a mortar I knew was too close.

A red flash stabbed at my eyeballs. About 15 yards away, on the upper end of the beach, it

smashed down four men from our boat. One figure seemed to fly to pieces. With terrible clarity I saw the head and one leg sail into the air. I got up, ran a few steps, and fell into a small shell hole as another mortar burst threw dirt on me. Lying there in terror looking longingly up the slope to better cover, I saw a wounded man near me, staggering in the direction of the amtracs. His face was half bloody pulp and the mangled shreds of what was left of an arm hung down like a stick, as he bent over in his stumbling, shock-crazy walk. The half of his face that was still human had the most terrifying look of abject patience I have ever seen. He fell behind me, in a red puddle on the white sand.

Mortar shells whished and whapped through the air over our heads. They hit without apparent pattern on the beach and in the reef at our backs. Turning my head seaward I saw a direct center hit on an amtrac. Pieces of iron and men seemed to sail slow-motion into the air. As bursts began to creep steadily from the reef in toward the beach, the shells from one mortar rustled through the air directly over our heads at intervals of a few seconds, bursting closer, closer.

Then a flat, cracking flash nearly burried me with sand. Wriggling out, and trying to wipe the sharp grains from my sweating eyelids, I saw in the clinging gray smoke that a burst had hit about six feet from my left foot, beyond the bank of loose sand at my side.

As I looked over my shoulder a burst smashed into a file of Marines wading toward our beach from a smoking amtrac. Jap machine guns lashed the reef with white lines and Marines fell with bloody splashes into the green water. The survivors seem so slow and small and patient, coming in there . . . ."

The Court may wish to compare the conditions complained of by Petitioner with the description in Vol. 5, ENCYCLOPAEDIA BRITANNICA, Death, 526, 528-529 (1974) under the caption "The Prospect of Dying" where the

author states "Studies on patients with terminal illnesses who face death imminently have revealed much of interest and psychosocial value regarding the personal response to the approach of death."

Respondent has copied and attached hereto as Appendix C the relevant contents of the article. Respondent does so merely to point out that petitioner's quoting from pathetic and sorrowful writings are misleading if they are meant to convey the scene at the death house as something unique to *it*, instead of that which is nearly universally true of all death.

Respondent contends the sovereign power of the nation "to provide for the common defense" to send its finest young men, who are guilty of nothing more than patriotism, to such deaths on a random basis to defend the nation from a perceived threat from *without* is no greater than the sovereign power of the nation "to insure domestic tranquility" to send duly convicted murderers and rapists to a quick death when that nation perceives the crimes of murder and rape as threats to its domestic tranquility from *within*.

There is nothing in the Constitution which limits the power of the government to make war, and there is nothing in the Constitution which limits the power of the government to implement the death sentence.

The limitations which do exist with regard to war are how it shall be made (Congress to declare and the President to be Commander in Chief).

Likewise, the limitations which do exist with regard to capital punishment are in the manner by which the sentence is arrived at (due Process), and the manner by which it is carried out (non-discriminatory and not cruel and unusual).

B. CORRECTION OF ERRONEOUS STATEMENTS IN PETITIONERS BRIEF

Petitioner's counsel in his brief at pages 16 through 19 has misinformed this Court when he states that following this Court's *Furman* decision, while other states "effectuated" the order of this Court, "North Carolina, however, took a very

different course." (Petitioner's Brief at pages 16-18).

Petitioner further states in his brief at pages 18-19:

> "Although the North Carolina Supreme Court had previously vacated several death sentences on *Furman* grounds, it ruled prospectively in *State v. Waddell*, . . . that the death penalty could continue to be imposed for North Carolina's four pre-*Furman* capital crimes without the enactment of new legislation."

while only noting in a footnote at page 23 of his brief that *Waddell* could not be sentenced to death consistently with the *ex post facto* clauses of the Federal and State Constitutions.

The *Waddell* decision is printed in its entirety herein as Appendix A for this Court's perusal. It is to be noted that North Carolina has followed this Court's decision in *Furman* to the letter just as every other state has. In every case in which a defendant was sentenced to death for a crime committed while the statutory provision was in effect which permitted the jury in its discretion to fix a sentence of life, the North Carolina Supreme Court has remanded the case to the trial court to impose a life sentence. A list including those cases is attached hereto as Appendix D.

What the North Carolina Supreme Court did in *Waddell* was to declare unconstitutional that portion of a statute which gave discretionary power to the jury to fix a sentence of life. That court, and only that court, had the constitutional right and duty to do so and no federal question is raised by that decision, and it is not now before this Court. Thus from the date of *Waddell*, the only permissible punishment for murder was death. Subsequently, the North Carolina General Assembly rewrote the statute making death the only punishment for first degree murder.

For all capital offenses *committed* prior to the date of the *Waddell* decision, the only permissible sentence in North Carolina is life imprisonment due to this Court's *Furman* decision.

It is interesting to note that where the issue was presented to five state Supreme Courts before their legislatures acted, two (Montana and South Carolina) decided the death penalty provision was unconstitutional while two, Delaware and North Carolina decided the discretionary power was void leaving death as the only punishment. Petitioner is just plain wrong when he says in his brief at page 21, Footnote 22, that *Dickerson* has been "nullified." The Delaware Supreme Court in *State v. Lenora Sheppard*, No. 162 (1974) decided December 30, 1974 said:

> "We are asked by defendant to reconsider *(Dickerson)*. We have done so . . . we are of the opinion that the conclusions reached in *Dickerson* are correct. We reaffirm and adhere to those conclusions." (Slip opinion pp. 5-6).[12]

Utah's Supreme Court did neither, merely characterizing this Court's *Furman* decision as "(expletive deleted)". *State v. Winkle*, ____ Utah ____, (1974)

Thus it is seen that Petitioner's characterization of the North Carolina Supreme Court's *Waddell* decision is, at best, hyperbole and at worst, disingenuous. But whichever the case may be, it is clear as clear can be that North Carolina's Supreme Court has not by "tortuous" reasoning (Petitioner's Brief p. 23) attempted to "emasculate a constitutional decision forbidding the imposition and carrying out of impermissible death sentences." (Petitioner's Brief p. 24). Some thirty states have reenacted some form of a mandatory death penalty since *Furman*, which fact is acknowledged in Petitioner's brief at page 17 and even summarized therein as Appendix A.

Thus, the only "tortuous" reasoning seen by respondent is that of petitioner's counsel in their journalistic and emotional jargon to keep this first degree murderer alive.

To illustrate, and then drop the point, petitioner contends the "contemporary standards" of civilized or decent

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12 Respondent notes in passing that one of Petitioner's counsel, a Mr. Amsterdam, was also counsel in the *Sheppard* case.

society condemn the death penalty. He then lists in his Brief a table of nations which have done so (Table 1 at p. 3d). Among those nations whose standards Petitioner wishes North Carolina to adopt are numerous South American nations. Considering that Chile only recently herded hundreds of its citizens into a stadium and machine-gunned them to death, respondent North Carolina, with a tip of the hat and thanks for the suggestion, replies "no thanks" to that standard of "decency" and "civilized society", or many other similar "standards" of some of those "civilized" nations listed on page 3d of petitioner's brief.

Other errors are contained in Petitioner's "brief" such as the calculations found in Footnote 145 at page 97 of his brief. A proper calculation for the years 1907-1915 shows there were 53 death sentences and 11 commutations, *i.e.*, a ratio of 11/53 or 20.75% (not 26.2% as stated by Petitioner), while during the years 1916-1940 there were 137 death sentences with 22 receiving commutations. Thus the ratio is 22/137 or 16.05% (not 19.1% as stated by Petitioner). The difference between the two periods chosen by Petitioner for purposes of illustration amount to only 4.7% (not 7%).

Petitioner cites as an "other" authority, Wicker, *"Christmas on the New Death Row,"* New York Times, December 25, 1973. In that article Wicker claims:

> " . . . (I)n North Carolina the White House plumbers would have received the death penalty for pulling the Watergate and Ellsberg burglaries."

Of course, most first year law students have learned that first degree burglary is an offense against the habitation and the purpose of the law in declaring Burglary in the nighttime to be such a serious offense was to protect the family at a time of repose and sleep from meditated harm.[13] In North Carolina breaking and enterings such as Watergate and Ellsberg's physicians office are not now, nor were they ever capital crimes. (See N.C. General Statutes §§14-51 and 14-54.)

In a concession to the shortness of life, Respondent's counsel acknowledges he has not checked for accuracy nearly

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13 *State v. Surles*, 230 N.C. 272, 52 S.E.2d 880 (1949)

all of the "authorities" cited in Petitioner's brief which consume twenty-nine (29) pages merely to list.

We do note however that many of the citations listed by Petitioner as "other authorities" can in no way be supportive of the proposition that the death penalty is cruel and unusual *per se*. For example *Elliot's Debates*, Thomson's *A Constitutional History of England, 1642-1801* and so forth.

II

CAPITAL PUNISHMENT IS NOT CRUEL AND UNUSUAL PUNISHMENT *PER SE* WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE CONSTITUTION.

Article V of the Corstitution of the United States provides that " . . . Amendments, . . . shall be valid to all intents and purposes, as part of this Constitution . . . . " Thus, no Amendment is construed to create a unique corpus juris standing alone and alien to other parts of, and Amendments to, the Constitution; it being an elementary rule of constitutional construction that effect shall be given to every part and every word of the constitution with no portion of the fundamental law being treated as superflous.[14] It must be read in context and as an entire instrument.[15] As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion.[16]

Justice Taney, in *Holmes v. Jennison*, 14 Pet (39 U.S.) 540, 570, 571 (1840) said:

> "In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the

14 *Wright v. United States*, 302 U.S. 583 (1938)
Myers v. United States, 272 U.S. 52 (1926)
15 *Downes v. Bidwell*, 182 U.S. 244 (1901)
16 *Ullman v. United States*, 350 U.S. 422 (1956), reh. den. 351 U.S. 928 (1956)

> whole instrument, that no word was unnecessarily used, or needlessly added."

And as recently as 1956, this Court said in *Ullman v. United States*, at pp. 428, 429:

> "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process . . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."

A case does not require a "construction" (at least as the word "construction" is ordinarily used) when the constitutional provisions are positive and free from all ambiguity. Here, the Fifth Amendment expressly provides that "No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, . . . without due process of law . . . . "[17] A like provision is found in the Fourteenth Amendment " . . . nor shall any state deprive any person of life, . . . without due process of law; . . . .[18]

This Court has previously noted that when constitutional provisions are positive and free from all ambiguity they must be accepted by the courts as they read and in such a case no construction is permissible.[19] Thus the Court is not at liberty to search for meanings beyond the Constitution[20] and should not, by a resort to sophistication, restrict an obvious meaning.[21]

In *United States v. Sprague*, at page 731, this Court said:

> "*The Constitution was written to be understood by the voters*; its words and phrases were used in their

17 United States Constitution, Amendment V
18 United States Constitution, Amendment XIV
19 *Wright v. United States*, 302 U.S. 583 (1938)
20 *United States v. Sprague*, 282 U.S. 716 (1931)
21 *Maxwell v. Dow*, 176 U.S. 581 (1900)

> normal and ordinary, as distinguished from technical, meaning; *when the intention is clear there is no room for construction and no excuse for interpolation or addition.*" (Emphasis added)

Respondent submits it should be noted that the term capital punishment means the same thing today as it did in 1771, *supra*, page 2, Footnote 2.

While the spirit of the Constitution is to be respected no less than its letter, that spirit is to be collected from its words, and neither practice nor extrinsic circumstances can control its clear language.[22] Thus the Constitution is to be construed in the light of its purpose and should be given a practical interpretation.[23]

Indeed, the Federal Constitution is not concerned with claims of rights which are unclear and gain hold by subtle and involved reasoning.[24] Justice Douglas noted in the *Darlington* case at page 91:

> "The Constitution is concerned with practical, substantial rights, not with those that are unclear and gain hold by subtle and involved reasoning."

This is necessarily so in order that the plainly manifested purpose of those who created it may be carried out.[25] In the *Classic* case, this Court said at page 316:

> "Thence we read its (Constitution's) words, not as we read legislative codes, which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government."

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22 *Sturges v. Crowningshield*, 4 Wheat (U.S.) 122 (1819)
23 *Smiley v. Holm*, 285 U.S. 355 (1932)
24 *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84 (1958)
25 *United States v. Classic*, 313 U.S. 299 (1941)
Perry v. Stancil, 237 N.C. 442, 75 S.E.2d 512 (1953)

"Those who created it" are the people, who according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives.[26]

Without question, one of the purposes of the people in establishing a government of limited and defined powers through a written constitution was to secure individual justice against oppressive government action. That was not, and is not the only purpose however.

The Preamble to the Constitution sets forth additional purposes, to wit: " . . . insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the Blessings of Liberty to ourselves. . . ."

It would indeed be a strange result to secure the blessings of life and liberty and freedom from fear of the government, only to surrender them to an unbridled and appreciable criminal segment which answers to no law except its own.

Respondent contends such was not the intent or purpose of the proscriptions of the Constitution. Respondent contends the purpose of this government was and is to secure life and liberty from the oppressive elements of both government officials and criminals.

Thus the Constitution provided for checks and balances and safeguards against tyranny by government while at the same time providing for a government with the means to capture, arrest, try and punish those criminals who would terrorize a community, criminally deprive a person of liberty, criminally deprive a person of life, or ravish the flower of our humanity . . . our women.

This Court has referred to the Preamble as evidence of the origin, scope and purpose of the Constitution.[27] With reference to the Preamble Alexander Hamilton observed in *The Continentalist* in 1781 that:

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26 *Downes v. Bidwell*, 182 U.S. 244, 251 (1901)
In re Ross, 140 U.S. 453, 464 (1891)
27 *McCulloch v. Maryland*, 4 Wheat (17 U.S.) 316, 403 (1819) (*Footnote 27 continued on page 26*)

> "In a government framed for durable liberty, not less regard must be paid to giving the magistrate a proper degree of authority to make and execute the laws with rigor, than to guard against encroachment upon the right of the community. As too much power leads to despotism, too little leads to anarchy, and both, eventually, to the ruin of the people."[28]

Justice Story in his *Commentaries* discussed the Preamble stating:

> Its true office is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the Preamble declares one object to be, 'to provide for the common defense.' No one can doubt that this does not enlarge the powers of Congress to pass any measures which they deem useful for the common defense. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one could promote and the other defeat the common defense, ought not the former, upon the soundest principles of interpretation, to be adopted?"[29]

Respondent contends it is impossible to read either the Constitution of the United States as an entire instrument or the Constitution of North Carolina and believe the sovereign people have done anything but provide that one of the permissible punishments for murder or rape shall be death.

And while Respondent may concede that a Constitution is a "living" instrument which is constantly renewed and

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Chisholm v. Georgia, 2 Dall (2 U.S.) 419, 470-1 (1793) *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304 (1816)

28 Mason. FREE GOVERNMENT IN THE MAKING. 3d Ed. (1965) at p. 154

29 1 Story, *Commentaries on the Constitution*, §462

affirmed by the people, that is not to say this Court through its members, using this logic, is free to place *any* meaning upon it which the Justices desire from time to time.

For as Montesquieu, in THE SPIRIT OF LAWS, observed:

> "We must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, so would he no longer be possesed of liberty, because all his fellow citizens would have the same power . . . . (and) constant experience shows us, that every man invested with power is apt to abuse it; and to carry his authority as far as it will go. Is it not strange, though true, that virtue itself has need of limits?"[30]

Could future Justices of this Court through this "living instrument" logic and line of reasoning, decide the guaranty of a Republican form of government was out of step with some future set of conditions and construe another word or phrase in the Constitution in such a manner as to nullify that guarantee?

Unreasonable contentions regarding construction of the Constitution have been rejected by the Court as recently as the case of *United States v. Nixon*, _____ U.S. _____, 41 L.Ed. 2d 1039 (1974), where the President, under the claim of a Constitutional privilege would have, in effect, read out of the Constitution the power of the Congress to impeach.[31]

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30 Mason, FREE GOVERNMENT IN THE MAKING, 3rd Ed. 1965 at p. 45.

31 It is to be noted this power was not placed in the hands of the Judicial branch. Thus it should be assumed in matters of highest moment such as war, impeachment and declaring what conduct is criminal and the proper punishment therefore, the Sovereign has placed that power in their elected representatives, while placing in this Court's hands the power to assure this is a nation governed by law – not men nor might.
(Footnote 31 continued on page 28)

Nixon's claim was bottomed on "national security" which everyone would agree, we assume, is of vital and legitimate public interest. But it is not paramount to the other legitimate demands of society which had placed in the hands of the legislature the power and duty to remove from office a President who would violate the law he was sworn to uphold.

Without question, Petitioner requests this Court to construe the Eighth Amendment in such a manner as to nullify express provisions of the Fifth and Fourteenth Amendments, and to deny to the States the power to prescribe and impose appropriate punishment for capital crimes.

Petitioner thus requests this Court to nullify, in reality, the power of the people as a republic, acting through their elected representatives, to establish appropriate punishment for crime. Respondent contends that to do this, the Court would be placing an unwarranted restriction on Article IV of, and the Tenth Amendment to, the Constitution of the United States as well as nullifying express provisions of the Fifth and Fourteenth Amendments.

Respondent had thought the doctrine of nullification was dead. If it is not, perhaps the Petitioner will suggest to us how the States, one of the crucial branches of the Federal System, might go about nullifying express parts of the Constitution or Acts of Congress or judgments of Federal courts which a majority of the voters of a State might disagree with.

Yet, Petitioner boldly requests this Court to veto laws passed by some thirty state Legislatures and the Congress of the United States in complete disregard of express provisions

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Constitutional Amendments, it should be further noted, cannot be originated by either the Executive branch or the Judicial branch, but only by the Congress or the *States* (Article V, Constitution of the United States).

Can it ever be implied that the constitution grants this Court the power to amend the very Constitution itself by "interpretation" or "construction"? Respondent submits the answer is clearly "no." See *Ullman v. United States, supra.*, page 22, footnote 16.

of the Constitution. He requests the Court to read into the Constitution words and implications which admittedly are not there, and which were never intended to be there. In short, he requests this Court become a superlegislature and that this be done in the name of reform. Respondents response to that request is:

> "The Constitution of the United States provides ample opportunity for the expression of popular will to bring about such reforms and changes as the people may deem essential to their present and future welfare. It is the people's charter of the powers granted (to) those who govern them . . . . "[32]

The lawmakers and law enforcers have an affirmative constitutional duty to insure domestic tranquility. This is the office of the criminal justice system.[33] The limitations placed upon them by both the Federal and North Carolina Constitutions are that "cruel and unusual" punishment shall not be inflicted.[34] Neither life nor liberty shall be taken except by due process of law; nor shall any person be denied equal protection of the law.[35]

Operating within those limitations, it is the States' legislatures' inherent and exclusive duty and it has the correlative right to define crime and provide for the punishment of crimes committed.[36]

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32 Senate Reports, 75th Congress, 1st Session, 5 January--21 August 1937, Vol. I, Report No. 711, "Reorganization of the Federal Judiciary."

33 *Pound, III Jurisprudence*, Chapter 14, Interests, §92 at p. 264,(1959)

34 United States Constitution, Amendment VIII

35 United States Constitution, Amendments V and XIV

36 Article I, § § 19, 22 and 27, North Carolina Constitution
Ex parte United States, 242 U.S. 27 (1916)
State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, (1963), appeal dismissed 375 U.S. 9 (1963)
Lawton v. Steele, 119 N.Y. 226, 23 N.E. 878 (1890), *aff'd.* 152 U.S. 133 (1894)

And it has been observed "The power is exclusive and it is not shared by the Courts. So long as constitutional prohibitions are not infringed, the will of the legislature in this respect is absolute."[37]

It is the duty of the executive to bring to justice those who commit crimes and the duty of the judiciary to assure the accused receives due process and equal protection of law.

Just as the Constitution of the United States contemplates capital punishment, so does the Constitution of North Carolina expressly provide therefor.[38]

And when an act of the legislature is called into question, this Court has previously observed:[39]

> "It is but a decent respect due the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt."

This Court in *Furman* examined the history of the Eighth Amendment as set forth at pp. 26 - 40 of the Petitioner's brief, yet every member of the Court conceded that the meaning of the amendment is unclear, even construed in the light of history and the case law.

Mr. Justice Douglas wrote, 408 U.S. at p. 244:

> "But the debates of the First Congress on the Bill of Rights throw little light on its intended meaning."

Mr. Justice Brennan said, 408 U.S. at p. 258:

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37 21 Am. Jur. 2d Criminal Law §14, p. 95, citing among others, *Central Lumber Co. v. South Dakota*, 226 U.S. 157 (1912), *Coffey v. Harlan County*, 204 U.S. 659 (1907)

38 North Carolina Constitution, Article XI, §2.

39 *Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213 (1824)

> "Almost a century ago, this Court observed that '(d)ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.' . . . Those statements remain true today."

Mr. Justice White concluded, 408 U.S. at p. 313:

> "But, like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds of federal and state criminal cases involving the crimes for which death is the authorized penalty."

Mr. Justice Marshall wrote, 408 U.S. at p. 315:

> The elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint.

The Chief Justice said, 408 U.S. at p. 375:

> "There is no novelty in being called upon to interpret a constitutional provision that is less than self-defining, but, of all our fundamental guarantees, the ban on "cruel and unusual punishments" is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command."

Mr. Justice Blackmun wrote, 408 U.S. at pp. 407-408:

> "The several concurring opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment. This is either the flat or the implicit holding of a unanimous Court in *Wilkerson v. Utah*, 99 U.S. 130, 134-135, in 1879; of a unanimous

Court in *In re Kemmler*, 136 U.S. 436, 447, in 1890; of the Court in *Weems v. United States*, 217 U.S. 349, in 1910; all of those members of the Court, a majority, who addressed the issue in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-464, 471-472, in 1947; of Mr. Chief Justice Warren, speaking for himself and three others (Justices Black, Douglas, and Whitaker) in *Trop v. Dulles*, 356 U.S. 86, 99, in 1958; in the denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889, in 1963 (where, however, Justices Douglas, Brennan, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had "neither taken nor endangered human life"); and of Mr. Justice Black in *McGautha v. California*, 402 U.S. 183, 226, decided only last Term on May 3, 1971."

Finally, Mr. Justice Powell said, 408 U.S. at p. 419:

"The Eighth Amendment, adopted at the same time as the Fifth, proscribes "cruel and unusual" punishments. In an effort to discern its meaning, much has been written about its history in the opinions of this Court and elsewhere. That history need not be restated here since, whatever punishments the Framers of the Constitution may have intended to prohibit under the "cruel and unusual" language, there cannot be the slightest doubt that they intended no absolute bar on the Government's authority to impose the death penalty."

Given the general uncertainty of this Court as to the intention and meaning of the amendment caused by the lack of compelling historical evidence, is it proved here "beyond all reasonable doubt" that the act of the General Assembly providing a penalty of death for murder is unconstitutional?

The North Carolina Supreme Court in *State v. Waddell* unanimously had no doubt that capital punishment, *per se*, is constitutional. *See State v. Waddell*, 282 N.C. at 435, 194 S.E.2d at 22-23. The assumption of constitutionality of the

penalty is also apparent from Chief Justice Bobbitt's dissent. He made the grounds of his dissent clear, 282 N.C. at 453-454, 194 S.E.2d at 31:

> " . . . I do not think *any death sentence* may be constitutionally inflicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment."

Justice Sharp, now Chief Justice, (a dissenter in *Waddell*) said, 282 N.C. at 476, 194 S.E.2d at 47:

> "In my view, there are no constitutional infirmities in capital punishment *per se* . . . ."

Accordingly, Respondent respectfully submits the answer to the first question should be answered "NO" in a decisive, unambiguous and authoritative decision.

III

IT IS AN INESCAPABLE FACT THAT APPROPRIATE PUBLIC OFFICIALS MUST EXERCISE THEIR HUMAN JUDGMENT BUT MUST DO SO IN GOOD FAITH AND ACCORDING TO LAW AND THEIR OATHS IN THE PERFORMANCE OF THEIR CONSTITUTIONAL DUTIES AT THE PROSECUTORIAL, VERDICT AND POST VERDICT STAGES IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN NORTH CAROLINA. THAT FACT ALONE DOES NOT BRING RESPONDENT'S MANDATORY DEATH STATUTES WITHIN THE PROSCRIPTIONS OF THE *FURMAN* DECISION.

Respondent has previously set forth some of the numerous statutory limitations placed upon public officials in the performance of their official duties under the caption "Constitutional and Statutory Provisions Involved" and will not repeat them here except to note that every official of whom

Petitioner complains is a Constitutional Officer of North Carolina. This includes the Governor, the district attorneys, the judges and the jurors.

Each must take an oath to uphold the Constitution of the United States as well as the Constitution of North Carolina before entering upon the duties of office, and it is a criminal offense punishable by up to two years imprisonment to willfully or intentionally neglect to perform the duties of office according to law. (N.C.G.S. §14-230)

Respondent submits that its public officials act true to their oaths of office just as do the officers of this Court. Indeed, the presumption is that a public official in the performance of an official duty has acted in good faith and in accordance with the law and the authority conferred on him. A person asserting the contrary must overcome the presumption by competent evidence.[40]

This is so because, as this Court has recently observed:

> " . . . the ends of criminal justice would be defeated if judgments (of courts) were to be founded on a partial or speculative presentation of the facts."

No evidence has been presented here, or even attempted to be presented, which would warrant an inference that North Carolina has acted contrary to the extant law since *Furman*. Just as the justices of this Court must exercise their respective judgments on given cases which come before the Court, it is, at once, obvious that real and substantial constraints are placed upon them. First, there is the solemn oath of office required by Article VI, Clause 3 of the Constitution of the United States. Second, there are the tried and proven historical restraints of Anglo-Saxon jurisprudence (the Common Law) on actions by government officials. It is thus that precedents in legal history, which have been so long accepted, have become the sanctions of society as a whole. Respondent says these sanctions are the real guts of liberty. Third, there is the written Constitution. Fourth, there is the diffusion of the powers of government. Then fifth, there is the plural nature of the government of the United States wherein neither the federal government nor the States have the right to exercise the full general sovereign powers, so that all governments are limited and may be said to be "quasi-sovereign." The sixth is the answerability of government officials for their conduct in office to the criminal law. And seventh, there is the requirement of frequent elections whereby the conduct of public officials receives a thorough

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40 *Housing Authority of Wilson v. Wooten*, 257 N.C. 358, 126 S.E.2d 101 (1962)

41 *United States v. Nixon*, _____ U.S. _____ 41 L.Ed.2d 1039, 1064 (1974)

and on-going inspection by the sovereign people. Thus it is seen that, contrary to what petitioner suggests, public officials do not have independence to roam in an unfenced field nor do they have an unbridled discretion to act.

Judges have the constraints of written constitutions, legislative acts and the precedents of prior cases which set forth the limits within which they are to exercise their judgment. Jurors and prosecutors not only have the constraints of law but, additionally, have the constraint of competent *evidence* which sets forth limits within which they are to exercise their judgment.

This is illustrated by resort to a few of many cases so holding in Respondent's State Supreme Court.

The principle upon which a defendant may be convicted upon a less degree of the same crime charged in the bill of indictment applies *"only where there is evidence"* of guilt of the less degree, and where burglary in the first and second degree is charged in the indictment, and the question as to guilt on the first count is withdrawn, and *"the evidence does not support the charge"* of second degree burglary, the defendant cannot be convicted of the lesser offense.[42]

The principle in regard to conviction of a lesser degree of the crime charged in a bill of indictment applies *"only where there is some evidence"* that a less degree of the crime had been committed, and where the State's uncontradicted evidence is to effect that the crime of rape had been committed and the defendant relies solely upon an alibi, the refusal of the court to charge upon the lesser degrees of the crime or of an attempt is not error.[43]

"Where all the evidence at the trial" of a criminal action, if believed by the jury, tends to show that the crime charged in the indictment was committed as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, the court should not instruct the jury that they

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42 *State v. Spain*, 201 N.C. 571, 160 S.E. 825 (1931)
43 *State v. Smith*, 201 N.C. 494, 160 S.E. 577 (1931)

may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree.[44]

A defendant may be convicted of a less degree of the crime charged, or for which he is being tried *"only when there is evidence to support the milder verdict."*[45] The jury does not have the arbitrary right or discretion to convict a defendant of a lesser degree of the crime charged or of a less serious offense than that charged *"where the uncontradicted evidence"* shows beyond a reasonable doubt that the defendant is guilty of the more serious offense charged in the bill of indictment.[46]

"Where all the evidence" tends to show that defendants feloniously took money from the person of prosecuting witness by violence and against his will through the use or threatened use of firearms, the court properly limits the jury to a verdict of guilty of robbery with firearms or a verdict of not guilty, *"there being no evidence"* warranting the court in submitting the question of defendants' guilt of less degrees of the crime.[47]

Where upon the trial for murder *"all the evidence tends to show"* that if the defendant is guilty, he is guilty of the crime of murder in the first degree, the failure of the trial court to charge upon the law of murder in the second degree or manslaughter is not error.[48]

"Where there is evidence to support a charge of murder and evidence to support the defendant's plea of homicide by misadventure, and also evidence of manslaughter," it is required that the "less degree of the same crime" be submitted to the jury with proper instructions.[49]

The extant situation then, is that government action must be taken upon decisions made. Decisions must be made upon judgment, and judgments must be made in good faith, upon oath, according to the law and evidence.

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44 *State v. Cox*, 201 N.C. 357, 160 S.E. 358 (1931)
45 *State v. Jordan*, 226 N.C. 155, 37 S.E. 2d 111 (1946)
46 *State v. Brown*, 227 N.C. 383, 42 S.E.2d 402 (1947)
47 *State v. Bell*, 228 N.C. 659, 46 S.E.2d 834 (1948)
48 *State v. Ferrell*, 205 N.C. 640, 172 S.E. 186 (1934)
49 *State v. Childress*, 228 N.C. 208, 45 S.E.2d 42 (1947)

The *judgment*[50] then which public officials must exercise (and only that which they *may* exercise) in the performance of their constitutional *duties* is an animal different in kind, rather than degree, from the *discretion*[51] which petitioner alleges Respondent's officials possess.

Respondent has examined and reexamined this Court's *Furman* decision and fails to find any support therein for the proposition advanced by Petitioner here that the *mere existence* of the power in public officials to make judgments results, *ipso facto*, in the imposition of death sentences which were proscribed by *Furman*.

Respondent reads *Furman* as standing for a single and limited proposition, to wit: where an unbridled discretion in sentencing authority exists (whether by judge or jury) to impose either a death sentence or a life sentence upon felons convicted of equal degrees of crime, then because of the manner (arbitrarily, capriciously and discriminatorily) in which those having such power have applied it in the past, such discretion violated the Constitution of the United States, and those sentenced to death pursuant to such an arbitrary power could not be executed.

The republican response to that decision has been to remove that unbridled discretionary power from judges and juries, and in North Carolina, all those convicted of an equal degree of the crimes of first degree murder or rape "shall suffer death."

Respondent having cured the constitutional defects in its administration of capital punishment which were found to exist in *Furman*, submits the answer to Petitioner's second question should be "NO" and the decision below should be affirmed.

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50 "judgment, n. 3. the ability to judge, make a decision or form an opinion *objectively, authoritatively*, and *wisely*." (Emphasis added), RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 772 (1966)

51 "discretion, n. 1. the power or right to decide or act according to *one's own judgment; freedom of judgment or choice* . . . ." (Emphasis added). *Id.* at 411.

IV

PETITIONER'S CHARGE THAT TRIAL BY JURY FOR A CAPITAL CRIME VIOLATES THE EIGHTH AMENDMENT TO THE CONSTITUTION IS A *NON-SEQUITUR*.

Petitioner's complaints (Petitioner's Brief pp. 62-95) regarding trial by jury admittedly leaves respondent's counsel somewhat adrift in preparing a response.

Where the State's legislatures had previously attempted to grant an admitted capital felon a right to save his own life by his guilty plea, this Court found that violated the Sixth Amendment's guarantee of trial by jury.[52]

To accept Petitioner's contention, one would have to embrace the *non-sequitur* that by enabling defendant to enjoy the guarantees afforded by the Fifth and Sixth Amendments the State necessarily violates the Eighth. A strange concept indeed.

V

STATES ARE CONSTITUTIONALLY PERMITTED TO CHOOSE AMONG ALTERNATIVE METHODS OF ACHIEVING THE ENDS OF CRIMINAL JUSTICE.

The Petitioner states in his Brief at pp. 121-122:

> "Criminal punishments are traditionally justified by five related but separable objectives: reformation and rehabilitation, moral reinforcement or reprobation, isolation or specific deterrence, retribution, and deterrence."

With this we agree. The General Assembly of this State has found, by providing for the death penalty, that capital punishment acts as moral reinforcement or reprobation by

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52 *United States v. Jackson*, 390 U.S. 570 (1968) and cases reversed on its authority in 403 U.S. 948 (1970)

exemplar to others; that it is the final and complete isolation of the offender which the security of the people ultimately requires; that the death penalty satisfies the need for social retribution; and that it acts as a deterrent.[53]

The requirement of the Constitution is not that the method *most effective* to the achievement of a permissible end be chosen, but that the means chosen not be inconsistent with and bear a rational relationship to the achievement of a permissible goal. The judgment of the General Assembly that capital punishment serves more nearly to achieve the permissible goals of criminal justice than life imprisonment is certainly not irrational, nor is it inconsistent with the legitimate and permissible aims it attempts to achieve. The selection of the *best method* is a legislative and not a judicial task. Petitioner's argument that life imprisonment better serves the aims of criminal justice is appropriately addressed to the General Assembly or to the people. It raises no justiciable issue.

In North Carolina, the court said "What constitutes cruel or unusual punishment . . . is not subject to expert (or other) opinion evidence."[54] Even so, Petitioner's citations to the opinions of those opposed to capital punishment seem to have exhausted the Index to Legal Periodicals on that subject.

Petitioner cites statistics and draws inferences therefrom that capital punishment is no deterrent to the commission of capital crimes. Respondent submits the following statistics[55] and contends one can, at least with equal certainty, draw an inference that capital punishment is a deterrent.

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53 The opinions of this Court in *Furman* demonstrate that the evidence on whether capital punishment, as an objectively determinable fact, acts as a deterrent, is at best, inconclusive. This question, like almost all of the questions relating to capital punishment is ultimately one to be determined by judgment rather than art. The ones to make that judgment are the delegate of the the people.

54 *State v. Rogers*, 275 N.C. 411, 168 S.E.2d 346 (1969)

55 Ben R. Miller, Chairman of the A.B.A. Section of Criminal Justice said in Volume 2, No. 3, Fall 1974 of the *Criminal Justice Bulletin* at page 3:
(*Footnote 55 continued on page 41*)

It is significant to Respondent that while the British Parliament was considering reinstating capital punishment for terrorist activities, the IRA got the "Christmas spirit" and declared a moratorium on their bombing activities and following the close parliamentary vote, the IRA now seems to be extending the moratorium.

As the shadow of the gallows grows nigh they seem to have lost their zeal for their merciless killing.

> "Contrary to many assertions that the possibility of apprehension, conviction and infliction of a death penalty cannot be 'proven' to be a strong deterrent, I submit that the F.B.I. Uniform Crime Reports for the years since 1960 conclusively substantiate the death penalty as a deterrent. There were 56 executions in 1960, 42 in 1961, 47 in 1962. In 1963 - as the movement to abolish and question the constitutionality of the death penalty gained momentum - there were but 21. Between 1963 and 1967, murder increased a dramatic 32%. In the same period, aggravated assault jumped over 43% and forcible rape 48%.
>
> One can only surmise that by the mid-sixties, the criminal element of our society, particularly the potential rapist and murderer, knew that there was a nationwide moratorium on the death penalty. In fact, the last execution was in 1967. In the ensuing five-year period, the rate for murder jumped 46%, aggravated assault 45%, and forcible rape 62%. To one who has practiced law over forty-five years, these 'statistics' were not necessary to establish that the death penalty for forcible rape was a very strong deterrent to the commission of that crime."

VI

CONTEMPORARY STANDARDS OF ONE OR MORE STATES OR THE FEDERAL GOVERNMENT CANNOT BE THE BASIS FOR ABROGATING RIGHTS OF OTHER STATES RESERVED TO THEM BY THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The State of North Carolina is one of the crucial essential elements of a diffused system of allocation of governmental powers. As such, it has duties to perform in providing for the safety and welfare of its citizens which no other agency may perform. It is a republican form of government and in the exercise of its constitutional role, and performance of its duties, it must have the correlative rights commensurate with the duties placed upon it.

This Court only recently had to resort to first principles of Constitutional government in *United States v. Richard M. Nixon*, _____ U.S. _____, 41 L.Ed.2d 1039 (1974) and said:

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.
>
> "Notwithstanding the deference each branch must accord the others, the 'judicial power of the United States' vested in the federal courts by Article III, §1 of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. The *Federalist*, No. 47, p. 313.

> "In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence. 'While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence; autonomy but reciprocity.'"

This Court noted that unreasonable Constitutional claims can "upset the constitutional balance of a workable government." (41 L.Ed.2d at 1063)

While the Court in *Nixon* was addressing itself to allocating the limited sovereign power it has between the three branches of the federal government, the same considerations apply with equal vigor to the federal -- state relationship.

Under the regime of Constitutional law as established in the United States, the separation of powers and checks and balances as a means to maintain liberty went further than separating only the three branches of the federal government. The constitutional scheme places heavy reliance upon the independence and sovereignty of the States. A.T. Mason, *Free Government in the Making*, 3d Ed. Oxford University Press (1965) at pages 140 and 141 observed:

> "John Adams (was) certainly among the best-informed men in the country on political science . . . (and) . . . Toward the end of his life Adams could take satisfaction in noting that the federal system followed his basic principle to an extraordinary degree, including, as he saw it, no less than eight balances: (1) states and territories against the central government; (2) the House of Representatives against the Senate; (3) the President against Congress; (4) the Judiciary against Congress; (5) the Senate against the President in matters of appointments and treaties; (6) the people against

their Representatives; (7) the state legislatures against the Senate; (8) the Electoral College against the people."

Scott, *Sovereign States and Suits*, (1925) at pages 55-57 observes:

> "Without laboring the matter further, it is abundantly clear that the States after the Declaration of 1776 were free, sovereign and independent, and they remained so, in the sense of international law, until they changed that status by their subsequent, and, as we shall see, voluntary act."

When the States changed their status with respect to the new government of the United States they did not surrender their sovereignty. The States granted certain of their powers to the United States and as Hamilton states in *The Federalist* (No. 45), "The Powers delegated by the proposed Constitution to the federal government are few and defined."

The proposition that the federal government is one of limited powers is so fundamental and so apparent that it needs little elaboration. As stated by Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. 316 (1819):

> "This government is acknowledged by all to be one of enumerated powers. . . . We admit, as all must admit, that the powers of the (federal) government are limited, and that its limits are not to be transcended."

Justice Story, in *Martin v. Hunter's Lessee*, 14 U.S. 303, 325 (1816), said:

> "The government, then of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."

There, then can be no dispute that the federal government has no powers beyond those delegated to it in the

Constitution. That is, it has only limited sovereignty.

This being so, then where does the remainder of the sovereign power lie? If the answer be "the people" then who has "the people" deemed should exercise the remaining powers of their sovereignty?

The State contends the answer is to be found in the tenth amendment to the Constitution, i.e., to the States, as previously stated in another context.

Roscoe Pound in Volume II, *Jurisprudence*, at page 317 *et. seq.* states:

> "As a legal conception, sovereignty seems to mean the aggregate of powers possessed by the ruler or ruling organs of a politically organized society. Internal sovereignty, then, is the aggregate of the powers of internal control possessed by the ruling organs of the society by virtue of which it is paramount over all action within. It is the capacity of making, declaring and amending the law . . . without reference to any other authority and without any legal limit to its own power. . . . . At common law, social interests were largely secured by a doctrine that the king was *parens patriae*, father of his country. That is, he was the guardian of public and social interests of all kinds and hence his courts of law and of equity had a general superintendence of all matters where "public rights" (i.e. social interests or public interests) might be jeopardized."

In Volume III, *Jurisprudence*, 264, Pound states:

> "Criminal law is the primary resource of the legal order for securing social interests immediately as such."

Pound further discusses *Interests* in Volume III, *Jurisprudence* at page 238, *et. seq*. He specifically discusses the interests of the state (in the international sense) as a legal entity.

> "*Interests of the state as a juristic person.* No small part of international law is taken up with the interests of states which international law should secure against infringement by other states. Thus it has usually been said that the absolute or natural rights of states, meaning the interests which it is held should be secured, are: (1) The right of self preservation and independence. This is analogous to the so-called natural rights of physical integrity and personal liberty ascribed to the individual. It is analogous to an individual interest of personality. (and) (2) The right of exclusive legislation and jurisdiction within its territory. This, too, is an interest of personality. It is an interest akin to the interest of the individual in being allowed to manage his own affairs freely. *Juristically, it is secured as a liberty.* . . . . "

As the tenth amendment is directed toward maintaining the class of interests referred to by Pound as "public interests," *id.* (Vol. III at page 235), this Court of the United States is equally obligated to protect the State of North Carolina's exercise of its retained sovereign rights as it is to protect any other constitutionally protected right whether it be individual or State.

This Court, even if it desired to do so, could no more abrogate a Constitutionally retained right of a State than it could a right of an individual. Thus "contemporary standards" of other states cannot be a proper basis for abolishing the death penalty under the Eighth Amendment any more than the "contemporary standards" of the McCarthy era could abolish the rights guaranteed to the individual under the Fifth Amendment to the Constitution.

Only by the exercise of the sovereign power of the State through its legislature may the punishment for murder or rape be lessened in North Carolina. Constitutionally, it is not intended that any other agency of government exercise that power unless it be by the people of North Carolina by vote on a constitutional amendment, this being the essence of a republican form of government.

VII

THE BLADE OF "MISTAKE" IS DOUBLE EDGED.

Petitioner's repetitive references to Professor Black's article regarding the possibility of mistake cuts like a sword. The prospect of the government making a mistake in its judgment thereby causing an innocent person to die is awesome and painful indeed. But the sword is double edged.

To illustrate, when the State exercised its judgment to expend its primary effort in the direction of humaneness, rehabilitation and confinement in the case of Henry Jarrette (See Appendix B, pp. 8b-10b) it erred. As a result of that error two innocent citizens fell victim to Jarrette's depravity. Gwendolyn Blackmon, a 16 year old black girl, was raped and David Timothy Parker's life was taken in a most vicious manner without benefit of law or clergy.

Respondent's government is of this earth and man. It is not blessed with omniscience and is incapable of transcendentalism. But it has placed every safeguard known to it to avoid the possibility of making the kind of mistake referred to by Petitioner.

It cannot, in any event, be said that Respondent has made a mistake in Petitioner's case. It is clear by all the evidence as well as his own admission that he killed John Griffin.

Respondent's system of checks to prevent mistakes from occurring which might otherwise cause it to execute an innocent person apparently works well. Indeed, not a single instance in the two hundred year history of capital punishment in North Carolina has been cited to this Court where Respondent has executed an innocent man or is even suspected of doing so.

The errors which have resulted in the loss of *innocent* life are those where the State has released a killer or rapist upon society only to have him kill or rape the innocent again.

Thus the government must take man as it finds him – capable of greatness on the one hand and depravity on the other. Its laws must allow for both characteristics and they do.

To the citizen who accepts Respondent's standards of decency and civilized conduct, and lives accordingly, opportunity to achieve greatness is open at every turn and redress for injury to him is granted as an absolute right.[56]

To the citizen who rejects Respondent's standards and embarks upon the most depraved course of conduct known to man, Respondent says to him that he must "suffer death" at its hands and it thus dispatches his soul on its way to take his case to a higher authority.

VIII

RESPONDENT'S STANDARDS OF DECENCY AND CIVILIZED BEHAVIOR ARE EXPRESSED IN ITS MOTTO *ESSE QUAM VIDERI* "TO BE RATHER THAN TO SEEM."

Petitioner finds fault with the civilized standards of decency and morality adopted by Respondent in the course of conducting the business of government.

Respondent's standards of governmental conduct is *justice according to law* and are second to none in this nation.

To illustrate, when the policy of the nation ran contrary to the law of Respondent in the matter of race relations, Respondent yielded. No federal troops, no U.S. marshals and no mounted police were ever necessary to enforce the new policy in North Carolina. Respondent's school system, for example, is now the most racially integrated in the nation. "Today, North Carolina has the most completely desegrated school system in the nation according to the latest statistics from the U. S. Department of Health, Education and Welfare."[57]

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56 Article I, §18, North Carolina Constitution, *supra*. page 3

57 Davis, *N. C. School Integration: 20 Years Later*, The News and Observer, May 12, 1974.

Thus it is seen that Respondent's motto *Esse Quam Videri* is more than rhetoric – it is reality.

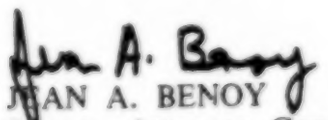
CONCLUSION

Petitioner's appeal to the virtue of this Court is a siren song, for the Petitioner's argument is bottomed upon the proposition that only the members of this Court are to be trusted with the ultimate determination of what is right, moral, decent and civilized in America. While it may be flattering, it is seen at once that the sovereign people trust no single man or body of men to make those judgments save themselves.

Accordingly, it is respectfully submitted that in contrast to Petitioner's impressive emotional appeal (more appropriately addressed to a State Legislature for legislative action or to the sovereign for constitutional amendment), the Respondent has addressed itself to the sole permissible basis for disposition of the present issues – the United States Constitution. Thus while Petitioner's argument might otherwise be moving, it must be subordinate to the unemotional criteria by which the law of our country must be construed as well as applied. Needless to say, official decisions tainted by emotional bias, regardless by whom made, subvert the spirit as weil as the letter of our laws. The Respondent thus contends that in the clear light of the Constitution, the decision of the Supreme Court of North Carolina must be affirmed.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; and that I have served copies of the Respondent's Brief by depositing three copies of same to Counselors for the Petitioner properly addressed to Jack Greenberg, 10 Columbus Circle, New York, New York, 10019; Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305; and Adam Stein, Chambers, Stein, Ferguson & Lanning, 157 East Rosemary Street, Chapel Hill, North Carolina 27514; and depositing same in the United States Post Office at Raleigh, North Carolina, with first class postage affixed.

This the 3rd day of February, 1975.

JEAN A. BENOY
Deputy Attorney General

COUNSEL FOR THE STATE OF NORTH CAROLINA, RESPONDENT

APPENDIX A

State v. Waddell

In Full Text

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1972

STATE OF NORTH CAROLINA v. JAMES HOWARD WADDELL

No. 5

(Filed 18 January 1973)

STATE OF NORTH CAROLINA v. JAMES HOWARD WADDELL

No. 5

(Filed 18 January 1973)

1. Constitutional Law § 36; Criminal Law § 135— death penalty — discretion of jury — unconstitutionality

Under the decision of *Furman v. Georgia*, 408 U.S. 238, the death sentence may not be inflicted if either judge or jury is permitted to impose that sentence as a matter of discretion.

2. Constitutional Law § 36; Criminal Law §§ 120, 135; Rape § 7— rape— jury discretion to recommend life imprisonment — unconstitutionality — mandatory death sentence

The decision of *Furman v. Georgia*, 408 U.S. 238, invalidated the proviso of G.S. 14-21 giving the jury the discretion to recommend and thus fix the punishment for rape at life imprisonment; however, the invalid proviso is severable from the remainder of the statute, leaving death as the mandatory punishment for rape in North Carolina.

3. Criminal Law §§ 120, 135— capital case — instructions to jury — mandatory death sentence

Upon the trial of any defendant charged with rape, murder in the first degree, arson or burglary in the first degree, the trial court may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment, but the court should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned; upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. G.S. 14-17; G.S. 14-21; G.S. 14-52; G.S. 14-58.

4. Constitutional Law § 35— ex post facto clause — applicability to judiciary — increase in punishment

While the letter of the *ex post facto* clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for crime applies as well against judicial action having the same effect.

5. Constitutional Law § 35; Criminal Law § 135— mandatory death penalty — prospective effect of decision

Since a judicial decision in effect changing the penalty for rape or other capital crimes from death or life imprisonment in the discretion of the jury to mandatory death would be *ex post facto* as to such offenses committed prior to the change, North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to 18 January 1973, the date of this decision. Art. I, § 16, N. C. Constitution; Art. I, § 10, U. S. Constitution.

Justice HIGGINS concurring in result.

Justice LAKE concurring.

Chief Justice BOBBITT concurring in part and dissenting in part.

Justice SHARP concurring in the opinion of Chief Justice BOBBITT.

DEFENDANT appeals from judgment of *Blount, J.*, December 1971 Session, SAMPSON Superior Court.

Defendant was tried on a bill of indictment, proper in form, charging him with the rape of Mrs. Thelma Jackson on the 8th day of June 1971.

The State's evidence tends to show that when Mrs. Thelma Jackson returned from work about 6 p.m. on 8 June 1971 she unlocked the back door and entered her home. She found a black man standing behind a chair in her living room. He had a stocking over his face and a butcher knife in his pocket. He placed Mrs. Jackson in a chair, tied her hands together with a small cord, and told her he would kill her if she made a noise. Then, using the same cord, he tied her ankles together. She screamed when a neighbor passed on a tractor, and he placed the knife to her neck and threatened to cut her throat.

The intruder then placed Mrs. Jackson on the couch, sat beside her, and said: "I know all about you. I know your husband has been dead about four and a half or five years and you never had any children and you live alone and I know about you." After several minutes of conversation with Mrs. Jackson, he pulled her up from the couch and walked her to the bedroom. This operation took about ten minutes since her feet were still tied. He sat her down in a reclining chair in the bedroom, unzipped her dress in the back, untied her hands, and stripped all her clothing down to the waist. He then tied her hands again, untied her feet and completely undressed her. He then stuffed a large roll of cotton in her mouth but removed it when it appeared she was unable to breathe. He ripped a pillowcase into strips, tying one strip over her mouth and blindfolding her with another. He then placed her on the bed and raped her.

While Mrs. Jackson was still blindfolded, her assailant removed her from the bed, put her clothing back on her, bound her legs together again, and sat her in a chair. He then moved about the house, apparently gathering foodstuffs and other items. In response to Mrs. Jackson's inquiry after he had made several trips to the kitchen, he stated he was doing "what I

have to do." He finally left about 7:30 p.m., having been in Mrs. Jackson's presence about an hour and a half, the last thirty minutes of which she was blindfolded. She had observed and talked with him for one hour while he was in her home.

Mrs. Jackson was bleeding badly from her privates and needed medical attention. She eventually worked her hands free, removed her blindfold, untied her feet, and sought help at the home of a black family who lived across the road. Deputy Sheriff Chase arrived within ten minutes after being called.

Items missing from Mrs. Jackson's home included an old pair of Knapp shoes belonging to her deceased husband (S-3), a small teaspoon (S-10), and a roll of adhesive tape. When apprehended, defendant was wearing the shoes and had the spoon and a roll of Johnson & Johnson Adhesive Tape in a little leather case. At the preliminary hearing and in court at the trial, Mrs. Jackson stated that she recognized defendant by his build, "his looks and all of it," and said she would recognize his voice if she ever heard it again. She positively identified defendant as the man who raped her.

After interviewing Mrs. Jackson the night of the rape, officers began an investigation of the crime scene, checking for fingerprints and footprints. Fingerprints were lifted from the windowsill where defendant had entered the house, from the front of the medicine cabinet mirror in the kitchen of the Jackson residence, from the first drawer of the chest of drawers in Mrs. Jackson's bedroom where defendant had obtained the pillowcases he ripped up, from inside the medicine cabinet door, and from a kitchen cabinet. All these fingerprints were later compared by an expert with ink impressions of defendant's fingerprints and in the opinion of the expert were identical.

A set of footprints led from Mrs. Jackson's home to a point in the woods at the base of a pine tree about one hundred fifty yards away where the officers found a pile of articles, including a lady's stocking, a piece of cord, an empty pear can, a pair of brown gloves, a pair of lady's panties and two pieces of a torn pillowcase. Many of these items were identified as having come from Mrs. Jackson's home.

While officers were searching for Mrs. Jackson's assailant, Bruce Jackson, a former highway patrolman, saw defendant in the woods eight to ten miles from Mrs. Jackson's home. Although many officers were in the area searching, Bruce Jackson was

alone at the time. He spoke to defendant who said his name was Jackson; that he worked for the Town of Dunn and "they had sent him down there to help capture that man that had messed that white woman about." When asked for some identification, defendant grabbed Bruce Jackson's shotgun and the two men tusseled over it for ten or fifteen minutes. Defendant kept repeating, "I am the one that you are looking [for] but you ain't going to tell anybody because I am going to kill you right here and now." During the tussle Mr. Jackson succeeded in firing the shotgun and thus attracted the attention of other officers in the woods. They converged on the scene and took defendant into custody.

Defendant offered no evidence. At the close of the State's evidence his motion for judgment of nonsuit was denied. The jury returned a verdict of guilty of rape as charged in the bill of indictment. Defendant's motion to set the verdict aside was denied and defendant was sentenced to death. He appealed to the Supreme Court assigning as error the denial of his motions and further contending that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

David J. Turlington, Jr., Attorney for defendant appellant.

Robert Morgan, Attorney General, and Jean A. Benoy, Deputy Attorney General, for the State of North Carolina.

HUSKINS, Justice.

We overrule defendant's assignments of error based on denial of his motions for nonsuit and to set aside the verdict. The evidence is overwhelmingly sufficient to carry the case to the jury and to support the verdict. Likewise, defendant's third assignment addressed to the charge has no merit and cannot be sustained. The court's charge on circumstantial evidence is free from prejudicial error. We therefore put aside these assignments without discussion and go directly to the constitutional question raised by defendant and argued in the briefs.

Defendant contends that the imposition and carrying out of the death penalty was held in *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct 2726 (1972), to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The State, on the other hand, disputes

defendant's interpretation of the holding in *Furman* and argues that the death sentence was lawfully and constitutionally imposed in this case and should be carried out. These antagonistic positions require an analysis of the *Furman* decision.

Furman v. Georgia was consolidated with *Jackson v. Georgia* and *Branch v. Texas* for decision. Each defendant was black. Furman killed a Georgia householder while seeking to enter the home at night. Jackson entered a Georgia home after the husband left for work, held scissors against the neck of the wife and raped her. Branch entered the Texas home of a 65-year-old widow, a white woman, while she slept and raped her, holding his arm against her throat. Furman was convicted of murder, Jackson and Branch of rape, and each was sentenced to death after a trial by jury which, under applicable Georgia and Texas statutes, had discretionary authority to determine whether to impose the death penalty. On certiorari, the United States Supreme Court reversed the judgment in each case insofar as it left undisturbed the death sentence imposed, and the cases were remanded for further proceedings. In an opinion expressing the views of five members of the Court, it was held that the imposition and carrying out of the death sentence in the three cases before the Court constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Four members of the Court dissented, voting to sustain the constitutionality of the statutes under which defendants were tried and sentence of death imposed.

Prior to the decision in *Furman v. Georgia, supra*, the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879); *In re Kemmler*, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); *Weems v. United States*, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); *Trop v. Dulles*, 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958); *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); *McGautha v. California*, 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to *Furman* casts the slightest doubt on the constitutionality of capital punishment. Therefore, since the decision in *Furman* is not grounded on prior decisions of the Court, the scope of

that holding must be gleamed from the separate opinions of the Justices themselves.

The nine opinions focus upon the Eighth Amendment which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The proscription of cruel and unusual punishments is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Powell v. Texas*, 392 U.S. 514, 20 L.Ed. 2d 1254, 88 S.Ct. 2145 (1968); *Robinson v. California*, 370 U.S. 660, 8 L.Ed. 2d 758, 82 S.Ct. 1417 (1962).

We note at the outset that only two members of the Court, Mr. Justice Brennan and Mr. Justice Marshall, concluded that capital punishment for all crimes under all circumstances is prohibited by the Eighth Amendment. Mr. Justice Brennan summarized his views in these words:

> "At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishment. . . . The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes. . . . Under these principles and this test, death is today a 'cruel and unusual' punishment."

Mr. Justice Marshall reached a like conclusion when he wrote:

> "There is but one conclusion that can be drawn from all of this—*i.e.*, the death penalty is an excessive and unnecessary punishment which violates the Eighth Amendment. . . . In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at thi time in their history."

Thus, it may be seen that these two Justices joined in the *Furman* decision on the basis that capital punishment is *per se* unconstitutional.

Mr. Justice Douglas rested his concurrence on a different basis. He wrote:

> "In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each *the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury.* In each of the three cases the trial was to a jury. [Emphasis added] . . . In a nation committed to Equal Protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, poor and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. . . . Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination. . . . Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. *Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.*" (Emphasis added.)

It seems clear that Mr. Justice Douglas left open the question of the constitutionality of a mandatory death penalty and voted to invalidate the death sentence in *Furman* and companion cases on the ground that the trial jury was given statutory discretion as to whether a defendant convicted of rape or murder should be sentenced to death or to life imprisonment.

Mr. Justice Stewart joined the majority opinion on similar grounds: That under the Georgia and Texas statutes, the death penalty was not mandatory for murder and rape but could be imposed in the unfettered discretion of trial juries, and that the exercise of this discretion resulted in "freakish" selection of those who should be executed for their crimes. He expressed his views as follows:

> "[A]t least two of my Brothers have concluded that the infliction of the death penalty is constitutionally im-

permissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. *But I find it unnecessary to reach the ultimate question they would decide.* [Emphasis added] . . . The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder. . . . These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

Mr. Justice White concurred in the majority opinion for reasons substantially similar to those of Justice Stewart. The following language from his concurring opinion depicts his views:

"In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment. . . . I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice. . . . That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries . . . has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course."

Four members of the Court dissented and voted to uphold the constitutionality of the Georgia and Texas statutes under which Furman, Jackson and Branch were tried and sentenced to death. The position of the four dissenters is best summed up by Chief Justice Burger as follows:

"There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned. . . . Capital punishment is authorized by statute in 40 States, the District of Columbia and in the federal courts for the commission of certain crimes. On four occasions in the last eleven years Congress has added to the list of federal crimes punishable by death. In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced. . . . Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice Stewart and Mr. Justice White, which are necessary to support the judgment setting aside petitioners' sentences, stop short of reaching the ultimate question. . . . The critical factor in the concurring opinions of both Mr. Justice Stewart and Mr. Justice White is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society's abhorrence of capital punishment . . . but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners' sentences must be set aside, not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion."

[1] The foregoing quotations from the various separate opinions in *Furman* compel the conclusion that capital punishment has not been declared unconstitutional *per se*. Rather, the *Furman* decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion.

[2] We now consider the effect of the *Furman* decision on G.S. 14-21 which reads as follows:

"Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or

more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: *Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.*" (Emphasis added)

Does *Furman* invalidate G.S. 14-21 in its entirety or invalidate only the discretionary proviso, leaving death as the mandatory punishment for rape in North Carolina? A look at history is necessary to put the question in proper perspective.

Blackstone's Commentaries tell us:

"Rape was punished by the Saxon laws . . . with death . . . . But this was afterwards thought too hard: and in its stead another severe, but not capital, punishment was inflicted by William the conquerer; *viz*, castration and loss of eyes; which continued till after Bracton wrote, in the reign of Henry the third. * * *

"In the 3 Edw. I. [1275] by the statute Westm. 1. c. 13. the punishment of rape was much mitigated: the offence itself being reduced to a trespass, if not prosecuted by the woman within forty days, and subjecting the offender only to two years imprisonment, and a fine at the king's will. But, this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edw. I. found necessary to make the offence of rape felony, by statute Westm. 2. c. 34. And by statute 18 Eliz. c. 7. it is made felony without benefit of clergy . . . . " 4 W. Blackstone, Commentaries, 211-2 (1st ed. 1769).

In 1778, the State of North Carolina enacted what is now G.S. 4-1 which states:

"All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

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By this statute the common law death penalty for rape was adopted in North Carolina. This punishment was codified in Vol. 1, c. 34, § 5 of the 1837 Revised Statutes of North Carolina.

In 1869, the General Assembly of North Carolina reenacted the punishment for rape in the following language:

"Every person who is convicted, in due course of law, of ravishing and carnally knowing any female of the age of ten years or more by force and against her will; or who is convicted, in like manner, of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death." Public Laws of 1868-69, c. 167, § 2.

An amendment in 1917 raised the age of consent from ten to twelve years. See Public Laws 1917, c. 29.

Thus, death has been the punishment for rape in North Carolina for almost two hundred years. Our present statute on the subject, G.S. 14-21, was amended in 1949 by adding the proviso which (1) empowers the jury in its discretion to recommend and thus to fix the punishment at life imprisonment, and (2) requires the trial judge to so instruct the jury. Session Laws of 1949, c. 299, § 4.

Since the 1949 amendment adding the proviso, seventeen bills or resolutions have been introduced in the General Assembly of North Carolina designed to abolish or limit the imposition of the death penalty for rape or other capital offenses. See House Bills 924, 925, 927 and 928 in the 1955 Session: House Bill 113 in the 1961 Session: House Bill 35, Senate Bill 27 and Senate Resolution 173 in the 1963 Session; House Bills 103 and 351 in the 1965 Session: House Bills 68, 71, 138 and 314 in the 1967 Session: House Bill 160 in the 1969 Session; and House Bill 397 and Senate Bill 251 in the 1971 Session. All of these bills and resolutions failed to receive a favorable report from the committee to which referred, or were tabled or defeated on the floor of the House in which introduced.

The new State Constitution, which was ratified by the people in the general election of 1970, retained the provision contained in the former Constitution of North Carolina authorizing the General Assembly to provide by statute for the imposition of the death penalty for murder, arson, burglary and rape. See Constitution of North Carolina, Article XI, Sec-

tion 2. Thus, there is nothing in the legislative or constitutional history of this State to indicate an intent by the Legislature, or by the people, to reduce the punishment for rape from death to life imprisonment, or to indicate that the 1949 proviso was enacted for that purpose except upon the discretionary recommendation of the jury, or to indicate that such proviso would have been enacted at all had its unconstitutionality been foreseen by the 1949 General Assembly. Rather, such history demonstrates a constant intent by the people and their representatives to retain the death penalty for murder, arson, burglary and rape notwithstanding the proviso added in 1949.

It is the proviso, and the proviso alone, which creates the discretionary difficulty condemned by the *Furman* decision; and it is quite clear that *Furman* strikes down the proviso as violative of the Eighth and Fourteenth Amendments.

The question then arises: Does the remainder of G.S. 14-21 stand alone with death as the mandatory punishment for rape? Or, is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?

In 16 Am. Jur. 2d, Constitutional Law, § 186, the rule of severability is thus stated:

> "If the objectionable parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional. If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid."

The original portion of G.S. 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the con-

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stitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion.

"Usually, when an amendatory exception to a statute proves unconstitutional, the original statute stands wholly unaffected by it." 16 Am. Jur. 2d, Constitutional Law, § 184. "When exceptions, exemptions, or provisos in a statute are found to be invalid, the entire act may be void on the theory that by striking out the invalid exception the act has been widened in its scope and therefore cannot properly represent the legislative intent. *This result is not reached, however, when the repugnant exception was added by way of amendment,* as it may be said that the Legislature did intend, at least originally, to pass the act without offering the exception." (Emphasis added) Sutherland, Statutes and Statutory Construction, § 2412 (3d ed. 1943).

In *Frost v. Corporation Commission,* 278 U.S. 515, 73 L.Ed. 483, 49 S.Ct. 235 (1929), the United States Supreme Court dealt with an Oklahoma statute which, as originally enacted, required a certificate of public convenience and necessity in order to engage in the business of operating a cotton gin. The statute was thereafter amended to insert a proviso exempting gins operated by cooperatives. The Court held the proviso violated the Equal Protection Clause of the Fourteenth Amendment but upheld the statute as initially written, saying:

> "Here it is conceded that the statute, before the amendment, was entirely valid. When passed, it expressed the will of the legislature which enacted it. Without an express repeal, a different legislature undertook to create an exception, but, since that body sought to express its will by an amendment which, being unconstitutional, is a nullity and, therefore, powerless to work any change in the existing statute, *that statute must stand as the only valid expression of the legislative intent.*" (Emphasis added)

In *United States v. Jackson,* 390 U.S. 570, 20 L.Ed. 2d 138, 88 S.Ct. 1209 (1968), the Supreme Court of the United States held invalid a proviso in the Federal Kidnapping Act (18 U.S.C. § 1201(a)) providing for the death sentence upon conviction of kidnapping under certain circumstances if the jury so recommended in its verdict. Originally, the statute made the crime punishable by imprisonment only. The Court held that

the remainder of the statute was valid since the unconstitutional proviso was severable from it, saying:

> "As we said in *Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 234: 'The unconstitutionality of a part of an Act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'
>
> "Under this test, it is clear that the clause authorizing capital punishment is severable from the remainder of the kidnapping statute and that the unconstitutionality of that clause does not require the defeat of the law as a whole."

The fact that the proviso in G.S. 14-21 gives the jury the discretion to recommend life imprisonment rather than death does not distinguish the case before us from *United States v. Jackson, supra.*

In *Bank v. Lacy*, 188 N.C. 25, 123 S.E. 475 (1924), this Court said: "The invalidity of one part of a statute does not nullify the remainder when the parts are separable and the invalid part was not the consideration or inducement for the Legislature to enact the part that is valid." To like effect: *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969); *Clark v. Meyland*, 261 N.C. 140, 134 S.E. 2d 168 (1964); *Fox v. Commissioners of Durham*, 244 N.C. 497, 94 S.E. 2d 482 (1956); *Power Co. v. Clay County*, 213 N.C. 698, 197 S.E. 603 (1938); *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 46 L.Ed. 679, 22 S.Ct. 431 (1902).

It is the proviso which confers upon juries the discretion to send one defendant to death and another to prison for life for the same crime committed under substantially similar circumstances. This, and only this, is what *Furman* condemns as violative of the Eighth and Fourteenth Amendments. The proviso, then, can no longer be given effect as part of the law of North Carolina. This leaves in effect the original statute making the death sentence mandatory upon a conviction of rape, and forbids an instruction to the jury that it may, in its discretion, fix a different punishment.

In light of the authorities cited, we hold that the unconstitutional proviso in G.S. 14-21 is severable and the remainder

of the statute with death as the mandatory punishment for rape remains in full force and effect. A similar conclusion was reached by the Supreme Court of Delaware in *State v. Dickerson*, ... Del. ....., ... A. 2d ....., 12 Cr. L. 2145 (decided 1 November 1972).

[3] We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in *Furman*, the Legislature may wish to delete the unconstitutional proviso from G.S. 14-21 (rape), G.S. 14-17 (murder), G.S. 14-52 (burglary), and G.S. 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the *Furman* decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constitutent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge.

Since the invalid proviso in G.S. 14-21 was given effect from the time it was enacted in 1949 to the date of the *Furman* decision in all cases wherein the defendant was convicted of rape or other capital crimes under the statutes applicable thereto, the practical effect of a judicial determination that the proviso is severable and therefore eliminated from the statute is to change the penalty for rape (or other capital crimes) from *death or life imprisonment in the discretion of the jury* to *mandatory death*. An upward change of penalty by legislative action cannot constitutionally be applied retroactively. Article I, section 16 of the Constitution of North Carolina forbids the enactment of any *ex post facto* law. The Federal Constitution contains a like prohibition against *ex post facto* enactments

by a state. See Constitution of the United States, Art. I, sec. 10. It has been held that this section of the Constitution "forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. * * * It hardly could be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." *Lindsey v. Washington,* 301 U.S. 397, 81 L.Ed. 1182, 57 S.Ct. 797 (1937). It thus appears that where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, as in the case before us, a change by the Legislature to death alone would be *ex post facto* as to such offenses committed prior to the change. *State v. Broadway,* 157 N.C. 598, 72 S.E. 987 (1911).

[4] While we recognize that that the letter of the *ex post facto* clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect. "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action' or 'that aggravates *a crime,* or makes it *greater* than it was, when committed.' [Citation omitted] If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. Columbia,* 378 U.S. 347, 12 L.Ed. 2d 894, 84 S.Ct. 1697 (1964).

[5] For the reasons stated, we hold that North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed prior to the date of this decision but shall be applied to any offense committed after such date. *Compare, Johnson v. New Jersey,* 384 U.S. 719, 16 L.Ed. 2d 882, 86 S.Ct. 1772 (1966).

We now turn to the task of applying the *Furman* decision, and the holding here, to the death sentence imposed upon defendant in this case.

Defendant was tried, convicted and sentenced under G.S. 14-21, and the trial judge instructed the jury, *inter alia,* as follows: "If you return a verdict of guilty of rape, you may accompany your verdict with a recommendation of life imprisonment. If you make no such recommendation, the law provides that the defendant will be put to death in the gas chamber. If you do so recommend, the punishment will be imprisonment for life. You are completely free to accompany a verdict of guilty with a recommendation of life imprisonment or not, as the law leaves that to your complete and unbridled discretion. Thus members of the jury, depending on how you find the facts, there are three possible verdicts which you may return, you may find the defendant guilty of rape with no recommendation; guilty of rape with a recommendation of life imprisonment or not guilty." Thus, the jury was permitted to exercise its discretion and choose between death and life imprisonment. The proviso in G.S. 14-21 requiring the judge to so charge and permitting the jury in its discretion to so choose is not materially different from the discretion vested in the jury by the Georgia and Texas statutes condemned by *Furman.* It is apparent, therefore, that *Furman* forbids the imposition of the death penalty in this case. This conclusion is buttressed by the fact that, following the decision in *Furman,* five cases in which we had affirmed the imposition of the death sentence were remanded to this Court by the Supreme Court of the United States "for further proceedings," the judgment of this Court having been vacated "insofar as it leaves undisturbed the death penalty imposed." We remanded those cases to the respective superior courts for imposition of sentences of life imprisonment. *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby and Chandler,* 281 N.C. 743, 191 S.E. 2d 66 (1972); *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70 (1972).

Accordingly, the judgment of the Superior Court of Sampson County insofar as it imposed the death penalty upon this defendant is reversed. The case is remanded to the Superior Court of Sampson County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Sampson County will cause to be served on the defendant, James Howard Waddell, and on his counsel of record, notice to appear during a session of said Superior Court at a designated time, not less

than ten days from the date of the notice, at which time, in open court, the defendant, James Howard Waddell, being present in person and being represented by his counsel, the presiding judge, based on the verdict of guilty of rape returned by the jury at the trial of this case at the December 1971 Session, will pronounce judgment that the defendant, James Howard Waddell, be imprisoned for life in the State's prison.

2. The presiding judge of the Superior Court of Sampson County will issue a writ of habeas corpus to the official having custody of the defendant, James Howard Waddell, to produce him in open court at the time and for the purpose of being present when the judgment imposing life imprisonment is pronounced.

REMANDED FOR JUDGMENT.

Justice HIGGINS concurring in result.

A Court opinion must reflect the views of the majority of the Court. A concurring in result opinion may reflect the individual views of the writer.

In my opinion, *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346, does not work any change in North Carolina trial procedure. The decision deals with punishment only. Hence in what are now our four capital felonies the trial court should, as in other cases, omit any reference to punishment and charge on the constitutent elements of the offenses and instruct the jury under what circumstances a verdict of guilty should be returned. As a result of the Court's holding in Furman, a charge on the right of the jury to recommend life imprisonment is now an idle gesture and should be omitted. The recommendation is not authorized until the jury unequivocally finds guilt. A conviction without a jury recommendation now requires life imprisonment and permits nothing more.

After discussing the effect of the 1949 amendment giving the jury power to recommend life imprisonment in our four capital felony cases, the majority opinion concludes: "It is the proviso, and the proviso alone, which creates the discretionary difficulty condemned by the Furman decision; and it is quite clear that Furman strikes down the proviso as violative of the Eighth and Fourteenth Amendments."

I do not so interpret the effect of Furman. That decision does not strike down the proviso and does not hold that it

violates the Eighth and Fourteenth Amendments. Furman holds that after the jury determines guilt and the State law permits either the court or the jury discretion whether the punishment shall be death or life imprisonment, life imprisonment must be imposed. Where discretion is given, Furman holds that a life sentence is valid but strikes down the death penalty. The rationale of the rule seems to be that if discretion between a death sentence or life imprisonment is given either to the court or the jury, the milder punishment must be imposed because in the interpretation of criminal statutes that which is the more favorable to the accused must be accepted.

The fixing of punishment for crime is a legislative function. The General Assembly, in my view, may fix death as the punishment for either or all of the four offenses named in Article XI, Section 2 of the North Carolina Constitution. The Legislature may provide the death penalty or it may provide life imprisonment, but when it undertakes to give an option, the milder judgment must be imposed.

In my opinion, this Court can no more strike out the proviso for life imprisonment than it can strike out the death penalty. Both provisions were inserted in the law by the General Assembly. I am unfamiliar with any authority this Court has to legislate on the subject by repealing either provision.

This further objection to the opinion: After the Court has "eliminated" the right of the jury to recommend life imprisonment in this case, the Court further decrees that capital punishment shall be restored after this Court's opinion is handed down. This holding seems to be required in order that the Court may dig itself out of the hole it fell into by its holding that Furman "strikes down the proviso as violative of the Eighth and Fourteenth Amendments." Furman, as I understand it, holds that life imprisonment is valid, but because of the option, Furman strikes down the death penalty.

Since writing the above I have read the well documented opinion of the Chief Justice. I fully concur therein.

Justice LAKE concurring.

I concur in all parts of the opinion of Justice Huskins. In view of the length of the dissenting portion of the opinion of the Chief Justice and of the number of authorities cited therein,

and because of the importance of the issue, I deem it advisable to state, as briefly as possible, why I do not find its argument persuasive or the citations convincing upon the question with which the opinion of Justice Huskins deals.

The jury having returned a verdict of guilty of rape without making a recommendation that the defendant's punishment be life imprisonment, a sentence to death was imposed by the trial court pursuant to G.S. 14-21. It is, therefore, our duty to determine the effect now to be given that statute by the courts of North Carolina. We may not properly bypass that task, nor escape our responsibility for it by labeling the question one of policy for determination by the Legislature.

The Supreme Court of the United States being the higher authority on the validity of judgments under the Constitution of the United States, its mandates, issued in reliance upon *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Huskins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded those cases to the respective superior courts for the imposition of sentences of life imprisonment.

The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in *Furman v. Georgia, supra*, and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.

Only this Court can determine whether any portion of G.S. 14-21 is the law of North Carolina today and, if so, which portion. The Legislature, now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's prerogative and responsibility. It is for us, and for us alone, to determine what part of G.S. 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpre-

tation of the statute—an exercise of the judicial function which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. I, § 6; Art. IV, § 1.

It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape hereafter committed. Constitution of North Carolina, Art. I, § 6; Art. II, § 1; Art. XI, § 2. But the Legislature has spoken in G.S. 14-21 and, until it speaks again, it is the duty of this Court to determine what, if anything, remains of its pronouncement in G.S. 14-21 after the decision in *Furman v. Georgia, supra*. No officer or agency, save this Court, can make that determination.

The determination of that question as stated in the opinion of Justice Huskins is, in my view, unassailably correct. If the Legislature, now sitting, deems the result of our determination is unwise, as a matter of policy, it may, as to rapes hereafter committed, adopt and promulgate a different rule as to punishment. That is its responsibility, not ours.

The opinion of the Chief Justice states:

> "If *Furman* had decided that the portion of G.S. 14-21 quoted above was separable and invalid and that death is now the sole and exclusive punishment for rape, such decision would apply to all rapes committed subsequent to 29 June 1972, the date *Furman* was decided. But this was not the decision in *Furman*."

Of course, it was not, for the simple reason, if for none other, that the Supreme Court of the United States does not have the authority to decide that question. Whether a statute is separable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.

Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. 14-21 is or is not separable. What it has said in *Furman v. Georgia, supra*, is that

the discretion which the proviso in G.S. 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court—today—not the date of the decision in *Furman v. Georgia, supra,* which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the Ex Post Facto principle.

The opinion of the Chief Justice further states:

> "*Furman* simply held that *the death penalty provision* of G.S. 14-21 as now constituted was invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out."

I do not find the words, "absent amendment," in any of the nine opinions by the justices in *Furman v. Georgia, supra,* nor in the per curiam statement of the decision therein. *Furman v. Georgia, supra,* did not hold "the death penalty provision of G.S. 14-21" invalid. It held, as the opinion of Justice Huskins states, that the death penalty cannot be imposed *at a time when juries or judges are given the discretion to impose the death penalty on one defendant and life imprisonment on another for the same offense*—quite a different thing.

I am unable to agree with the reasoning by which the Chief Justice reaches the conclusion that the defeat in 1971 of the legislative proposal to abolish the death penalty for rape and make life imprisonment the mandatory punishment therefor now compels us to hold that, since *Furman v. Georgia supra,* life imprisonment has become the mandatory punishment for the crime. Quite obviously, the 1971 Legislature preferred, as a matter of policy, to leave North Carolina juries in possession of the discretion which the 1949 amendment to G.S. 14-21 attempted to give them. It seems to me perfectly clear that the 1971 Legislature did not believe the then prophecy that the United States Supreme Court would decide as it did in *Furman v. Georgia, supra.* As the opinions of the four dissenting justices in *Furman v. Georgia, supra,* show, the earlier decisions of the Court afforded ample basis for such legislative disbelief. However, in any event, the Chief Justice's opinion, if adopted by

this Court, would result in our declaring G.S. 14-21 now to mean precisely what the 1971 Legislature expressly refused to make it say. This we may not do. The Legislature of 1971 obviously wanted the whole of G.S. 14-21, including the proviso, which it believed constitutionally permissible, but this is far from showing it wanted the whole or nothing. It certainly fails to show that, if unable to have the whole, it wanted the part which it refused to adopt, standing alone, in preference to the part which it refused to repeal.

The array of decisions from other states, cited in the opinion of the Chief Justice, are simply in point on the question of the severability of G.S. 14-21. In the first place, substantially all of them, if not all, held only that the death penalty may not be imposed by a state in a case which arose and was adjudicated while the state undertook to give its juries the discretion which *Furman v. Georgia, supra,* held cannot be vested in juries. In so holding these decisions do not conflict with the opinion of Justice Huskins. In the second place, of all the cited decisions only those from Mississippi and Florida appear to contain any discussion of the question of the severability of the various state statutes involved and the Mississippi and Florida decisions appear to rest on the acceptance by those courts of the view that their statutes were severable and the life sentence provisions therein were the parts which survived the decision in *Furman v. Georgia, supra.* In the third place, decisions from other states as to the severability of their statutes cannot help us materially in determining whether our own statute is severable, even if the wording of the statutes be identical, because the legislative history of the respective statutes may well be quite different. As the opinion of Justice Huskins demonstrates, the history of G.S. 14-21 leads to the conclusion that the proviso, added by the amendment of 1949, is severable from the remainder of the statute.

It is one thing to hold, as the Mississippi and Florida Courts appear to have done, that a statute like G.S. 14-21 is severable and the part which survives *Furman v. Georgia, supra,* is that providing for a life sentence. This would, as Justice Huskins has demonstrated, simply be a most strained and improbable view of the intent of the North Carolina Legislature in the light of its repeated refusals to abolish capital punishment. It is a far different thing to say, as the opinion of the Chief Justice suggests, that G.S. 14-21 is an inseparable whole.

If this view suggested in the opinion of the Chief Justice were correct, it would necessarily follow that the imposition of a sentence to imprisonment for life would be unlawful. It is well settled, as shown by the authorities cited by Justice Huskins, that if the provisions of a statute are, indeed, so interrelated that they are an inseparable whole, the statute cannot be partly unconstitutional and partly constitutional. Quite obviously, the effect of *Furman v. Georgia, supra,* is that G.S. 14-21 is not, in its entirety, constitutional. If it be inseparable, then the entire statute would fall under the impact of *Furman v. Georgia, supra,* and G.S. 14-21 would authorize no sentence whatever. In that event, rape being a felony at common law and no specific punishment being provided by a valid statute, G.S. 14-2 would apply and the maximum sentence for rape would be imprisonment for ten years plus a fine.

Of course, the real thrust of the opinion of the Chief Justice is not that G.S. 14-21 is inseparable but that it is separable and that the proviso is the surviving portion. This I find inconsistent with the legislative history of the statute, correctly set forth by Justice Huskins.

Chief Justice BOBBITT concurring in part and *dissenting* in part.

I agree with the majority's conclusion that "the *Furman* decision [*Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972)] holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion." Under North Carolina statutes, whether the punishment for first degree murder, or rape, or burglary in the first degree, or arson, is to be death or life imprisonment depends solely on how the jury exercises its unbridled discretion.

Prior to *Furman,* this Court had sustained the convictions and death sentences in *State v. Miller,* 276 N.C. 681, 174 S.E. 2d 481 (1970); *State v. Hamby and Chandler,* 276 N.C. 674, 174 S.E. 2d 385 (1970); *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971); and *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971). On authority of *Furman,* the Supreme Court of the United States vacated the judgment(s) in each of these cases "insofar as it [left] undisturbed the death penalty imposed,"

and remanded the case to this Court for further proceedings. *Miller v. North Carolina,* 408 U.S. 937, 33 L.Ed. 2d 755, 92 S.Ct. 2863 (1972); *Hamby and Chandler v. North Carolina,* 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862 (1972); *Chance v. North Carolina,* 408 U.S. 940, 33 L.Ed. 2d 764, 92 S.Ct. 2878 (1972); *Westbrook v. North Carolina,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972); *Doss v. North Carolina,* 408 U.S. 939, 33 L.Ed. 2d 762, 92 S.Ct. 2875 (1972). Thereupon, this Court remanded each of these cases to the superior court which had tried it with direction that judgments imposing a sentence of life imprisonment be pronounced. *State v. Miller,* 281 N.C. 740, 190 S.E. 2d 841 (1972); *State v. Hamby and Chandler,* 281 N.C. 743, 191 S.E. 2d 66 (1972); *State v. Chance,* 281 N.C. 746, 191 S.E. 2d 65 (1972); *State v. Westbrook,* 281 N.C. 748, 191 S.E. 2d 68 (1972); *State v. Doss,* 281 N.C. 751, 191 S.E. 2d 70 (1972).

The decision on this appeal is that *Furman* requires that this Court vacate the death sentence and remand *this case* to the superior court for the pronouncement of judgment imposing a life sentence. I emphatically agree with this decision. Moreover, I do not think *any death sentence* may be constitutionally inflicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment. In my opinion, this Court has no right to ignore, delete or repeal these provisions, which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. *Furman* did not repeal them. This Court has no right to repeal them.

While unnecessary to the disposition of this appeal, the majority opinion states the views of four members of this Court with reference to the conduct of trials and the sentencing of defendants in the future for crimes of murder in the first degree, rape, burglary in the first degree and arson *committed subsequent to the present decision.* Since the decision in *Furman,* several cases have been tried in our superior courts in which the defendants were convicted and sentenced to life imprisonment when the jury returned verdicts of guilty (no recommendation as to punishment being involved) and at least two cases in which upon a like verdict the defendant received a death sentence. My dissent is not directed to the fact that the majority are giving an advisory opinion or directive to our superior

court judges with reference to crimes committed *subsequent to Furman*. Although the appeals in these cases will come to us in due course, I agree that our superior court judges are *now* entitled to some directive from this Court. *The ground on which I dissent is that the majority are giving what I consider to be the wrong advisory opinion or directive.*

The views expressed in the majority opinion *to which I dissent* may be summarized as follows: The *Furman* decision invalidates the portion of G.S. 14-21 which reads: "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." The invalidation of this provision leaves intact that portion of the statute which precedes it and provides for punishment by death. The *Furman* decision does not invalidate the death penalty under present North Carolina statutes. It makes death the sole and exclusive punishment for rape. However, the death penalty is not to be imposed and carried out except for crimes committed subsequent to the filing of *this* decision.

If *Furman* had decided that the portion of G.S. 14-21 quoted above was separable and invalid and that death is now the sole and exclusive punishment for rape, such decision would apply to all rapes committed subsequent to 29 June 1972, the date *Furman* was decided. But this was *not* the decision in *Furman*. *Furman* simply held that *the death penalty provision* of G.S. 14-21 as now constituted was invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out. The dismemberment of G.S. 14-21, and the declaration that death is the sole and exclusive punishment for rape, are neither required nor warranted by the decision in *Furman*.

Under Article XI, §§ 1 and 2, of the Constitution of North Carolina, the General Assembly is authorized to provide that the crimes of murder, rape, burglary and arson, and these only, may be punishable by death. Pursuant thereto, the General Assembly has enacted statutes which provide that a person convicted of first degree murder, G.S. 14-17, or of rape, G.S. 14-21, or of first degree burglary, G.S. 14-52, or of arson, G.S. 14-58, shall suffer death *unless* the jury, at the time of rendering its verdict in open court, recommends that the defendant's punishment shall be imprisonment for life in the State's prison.

There has been no change in any of the provisions of G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58, since the enactment of Chapter 299, Session Laws of 1949, which contains the following: "Sec. 4. Section 14-21 of the General Statutes of North Carolina is hereby *rewritten* so as to read as follows:

"Sec. 14-21. Punishment for rape. Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: *Provided*, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." (Our italics.)

Sections 14-17, 14-52 and 14-58 of the General Statutes were rewritten by sections 1, 2 and 3 of Chapter 299, Session Laws of 1949. As rewritten they prescribed in like manner the punishment for murder in the first degree, burglary in the first degree and arson, respectively.

Our General Assembly has provided that no death sentence can be pronounced unless (1) the jury is instructed that the mandatory punishment will be death unless the jury when returning its verdict in open court recommends that the punishment be imprisonment for life in the State's prison, and unless (2) notwithstanding such instruction the jury returns a verdict of guilty and does not recommend that the punishment be imprisonment for life in the State's prison. Subsequent to the enactment of the 1949 Act, whether the punishment for murder in the first degree, or for rape, or burglary in the first degree, or for arson was to be death or life imprisonment was to be determined by juries, case by case, rather than by law applicable to all who committed crimes bearing those names. This Court consistently held that no constitutional right of a defendant was violated by provisions which authorized the jury, upon finding a defendant guilty of murder in the first degree, or of rape, or of burglary in the first degree or of arson, to determine whether the punishment was to be death or imprisonment for life, notwithstanding the absence from the statute of any standards to guide the jury in making that determination.

Notwithstanding our decisions upholding G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58, the possibility that the Supreme Court of the United States would render a decision substantially

like the decision in *Furman* had been anticipated. In the report submitted by the Judicial Council for consideration by the General Assembly of 1969, attention was called to this possibility. *If the General Assembly wished to continue the death penalty for the crime of rape,* it was recommended that G.S. 14-21 be amended by *striking the following:* "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's Prison, and the court shall so instruct the jury." Similar recommendations were made with reference to G.S. 14-17 (first degree murder), G.S. 14-52 (first degree burglary) and G.S. 14-58 (arson). To implement these recommendations, bills were prepared and introduced. H.B. No. 136 (relating to rape, first degree burglary and arson), and H.B. No. 137 (relating to murder in the first degree), were referred to Judiciary Committee No. 2 of the House. Both received unfavorable reports. The General Assembly, although advised that the provision for the imposition of a death sentence might be held invalid, refused to prescribe death as the punishment for rape without providing for the alternative of life imprisonment if the jury so recommended.

H.B. No. 397 was introduced in the General Assembly of 1971. Section 2 thereof provided: "Sec. 2. G.S. 14-21 is hereby amended by striking the following words: 'shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison.', and by inserting in lieu thereof the following words: 'shall suffer punishment by imprisonment for life in the State's prison.'" Sections 1, 3 and 4 of H.B. No. 397 provided for the amendment in like manner of the provisions of G.S. 14-17, G.S. 14-52 and G.S. 14-58 relating to punishment for murder in the first degree, burglary in the first degree and arson. H.B. No. 397 was referred to and (as amended) reported favorably by Judiciary Committee No. 2 but failed to pass the House on second reading.

The reasonable inference from the foregoing is that the General Assembly wanted G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 to remain exactly as they had been since 1949 and as upheld by the decisions *of this Court.* All provisions of G.S. 14-21 relate to the single subject indicated by the caption, to wit, "Punishment for rape." The provisions thereof constitute a single legislative plan. Only the *death penalty provision* was invalidated by *Furman.*

It is the decision of a majority of this Court—not the decision in *Furman*—which dismembers G.S. 14-21 and declares a particular portion thereof invalid and undertakes—in direct conflict with *Furman*—to validate the death penalty provision of G.S. 14-21 and adjudge that under present statutes death is the sole and exclusive punishment for rape. The main thrust of *Furman* is to restrict the circumstances in which capital punishment may be imposed. It is not only legally unsound but ironic and unrealistic to use *Furman* as a basis for holding that *hereafter under present statutes* death will be the sole permissible punishment for rape.

Whether the General Assembly *would have prescribed* death or life imprisonment if it had been confronted with the necessity of making that decision cannot be answered. In my view, this question must be answered now by the General Assembly rather than by this Court's speculation as to what the General Assembly at previous sessions would have done if they had been confronted with the necessity of making that decision.

The reliance placed by the majority on *United States v. Jackson,* 390 U.S. 570, 20 L.Ed. 2d 138, 88 S.Ct. 1209 (1968), invites further consideration of that decision. In *Jackson, the death penalty provision* of the Federal Kidnapping Act (18 U.S.C. § 1201 (a)) was held *invalid* because it imposed an impermissible burden upon an accused's exercise of his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand a jury trial. In *Pope v. United States,* 392 U.S. 651, 20 L.Ed. 2d 1317, 88 S.Ct. 2145 (1968), based on *Jackson, the death penalty provision* of the Federal Bank Robbery Act (18 U.S.C. § 2113(e)) was held *invalid.* No other provision of either of these statutes was invalidated.

The provision for punishment by death "if the verdict of the jury shall so recommend" considered in *Jackson* was incorporated in the Federal Kidnapping Act when rewritten by the Act of May 18, 1934, 48 Stat. 781-82. The death penalty provision considered in *Pope* was a part of the original Federal Bank Robbery Act of May 18, 1934, 48 Stat. 783. Section 3 provided that the violation thereof "shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct." No statute *amending* or *rewriting the original Act* was involved.

Whether the death penalty provision was a part of the original act or incorporated by later amendment or rewriting

was not the basis of decision in either *Jackson* or *Pope*. Moreover, the decisions in *Jackson* and *Pope* were not based upon the discretionary power granted to the jury. They were based upon the fact that Rule 23(a) of the Federal Rules of Criminal Procedure provided: "Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the Government." Under this rule, if a defendant was permitted to plead guilty or to waive a jury trial, he would thereby avoid the possibility of a death sentence.

In *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972), the defendant appealed to this Court from a judgment which imposed death sentences based on verdicts of guilty of murder in the first degree (without recommendation of life imprisonment). The murders for which defendant was indicted and convicted were committed on 29 June 1971.

The opinion in *State v. Anderson, supra* at 267, 188 S.E. 2d at 340, states: "*Jackson* and *Pope* stand for the proposition that every defendant has a constitutional right to plead not guilty and that the Federal Constitution does not permit the establishment of a death penalty applicable only to those defendants who assert their constitutional right to contest their guilt before a jury."

Chapter 616, Session Laws of 1953, codified as G.S. 15-162.1, provided in pertinent part as follows: "(a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel, whether employed by the defendant or appointed by the court under G.S. 15-4 and G.S. 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. . . . (b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison."

This Court, being of the opinion that the procedure authorized by G.S. 15-162.1 did not preclude a sentence of death after

a conviction by a jury without recommendation of life imprisonment, upheld the convictions and death sentences in the following cases: *State v. Atkinson* (murder), 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Hill* (murder), 276 N.C. 1, 170 S.E. 2d 885 (1969); *State v. Roseboro* (murder), 276 N.C. 185, 171 S.E. 2d 886 (1970); *State v. Sanders* (murder), 276 N.C. 598, 174 S.E. 2d 487 (1970); *State v. Williams* (murder), 276 N.C. 703, 174 S.E. 2d 503 (1970); *State v. Atkinson* (rape), 278 N.C. 168, 179 S.E. 2d 410 (1971).

Subsequently, based on *Jackson* and *Pope*, the Supreme Court of the United States reversed the judgments in these cases "insofar as [they] impose[d] the death sentence" and remanded the cases to this Court for further proceedings. *Atkinson v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971); *Hill v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2287 (1971); *Roseboro v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2289 (1971); *Sanders v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971); *Williams v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971); *Atkinson v. North Carolina*, 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292 (1971).

Thereafter, this Court remanded each of these cases to the superior court where it was tried with directions that judgments imposing sentences of life imprisonment be pronounced. *State v. Atkinson*, 279 N.C. 386, 183 S.E. 2d 106 (1971); *State v. Hill*, 279 N.C. 371, 183 S.E. 2d 97 (1971); *State v. Roseboro*, 279 N.C. 391, 183 S.E. 2d 108 (1971); *State v. Sanders*, 279 N.C. 389, 183 S.E. 2d 107 (1971); *State v. Williams*, 279 N.C. 388, 183 S.E. 2d 106 (1971); *State v. Atkinson*, 279 N.C. 385, 183 S.E. 2d 105 (1971).

In the report submitted by the Judicial Council for consideration by the General Assembly of 1969, attention was called to the possibility that the Supreme Court of the United States would hold that a death sentence could not be imposed and carried out if a defendant could avoid the possibility of a death sentence by pleading guilty and thereby surrendering his right to jury trial. If the General Assembly wished to continue the death penalty, it was recommended that G.S. 15-162.1 be repealed. G.S. 15-162.1 was repealed by Chapter 117, Session Laws of 1969. It is here noted that G.S. 15-162.1 was not detached and invalidated by the decisions of the Supreme Court of the United States in the six cases referred to above.

As noted in *State v. Anderson, supra:* "[F]or some obscure reason, the General Assembly reenacted the provisions of G.S. 15-162.1 by Chapter 562 of the 1971 Session Laws, effective 15 June 1971. Then, apparently to correct the error, G.S. 15-162.1 was again repealed by enactment of Chapter 1225 of the 1971 Session Laws, effective 21 July 1971. It thus appears that from 15 June 1971 to 21 July 1971 the death penalty provisions of our statutes once again applied only to those defendants who asserted their right to plead not guilty. *United States v. Jackson, supra; Pope v. United States, supra; Atkinson v. North Carolina, supra.* Here, the murders were committed on 29 June 1971 while the provisions of G.S. 15-162.1 were in effect, and therefore the death sentences in these cases are unconstitutional and cannot be carried out. *Hill v. North Carolina, supra* [403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2287]." The murders having been committed when (reinstated) G.S. 15-162.1 was in effect, this Court vacated the death sentences and remanded the cases to the superior court for the pronouncements of judgments imposing sentences of life imprisonment.

From 1953 until the repeal of G.S. 15-162.1, North Carolina's legislative plan in respect of the death penalty was embodied in G.S. 14-17, G.S. 14-21, G.S. 14-52, G.S. 14-58 and in G.S. 15-162.1. Although enacted in 1953 as a separate statute, G.S. 15-162.1 was *in pari materia* with G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 as rewritten in 1949. Hence, G.S. 15-162.1 had to be considered as if its provisions were incorporated in G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 as rewritten in 1949. When the Supreme Court of the United States, on authority of *Jackson* and *Pope,* vacated the death sentences which this Court had upheld in *Atkinson, Roseboro, Sanders,* and *Williams,* it did not hold that G.S. 15-162.1 was invalid. As this Court recognized in *State v. Anderson, supra,* what the Supreme Court held was that so long as G.S. 15-162.1 remained a part of our legislative plan, no death sentence could be imposed or carried out. This objection could be and was removed by the repeal of G.S. 15-162.1. In like manner, the decision in *Furman* does not invalidate any particular clause of G.S. 14-17, G.S. 14-21, G.S. 14-52 or G.S. 14-58. It simply holds that no death sentence can be imposed and carried out as long as our statute contains provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment.

The *Furman* decision was filed 29 June 1972. Its impact upon state statutes similar to our G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58 was considered in the decisions discussed below.

In *State v. Johnson,* 31 Ohio St. 2d 106, 285 N.E. 2d 751 (1972), the jury found the defendant guilty of murder in the first degree and did not recommend mercy. His appeal from a death sentence was decided by the Supreme Court of Ohio on 19 July 1972. The pertinent portion of the Ohio statute provided: "Whoever violates this section is guilty of murder in the first degree and shall be punished by death unless the jury trying the accused recommends mercy, in which case the punishment shall be imprisonment for life." Ohio R.C. § 2901.01 (1954).

The following excerpts from the opinion of Justice Brown set forth the disposition of the appeal and the rationale of the Court's decision:

"The United States Supreme Court, in *Furman v. Georgia* . . . has held that the carrying out of a death penalty imposed at the discretion of the trier of the facts constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

"*Under that holding, which we are required to follow, the infliction of the death penalty under the existing law of Ohio is now unconstitutional* (with the possible exception of the taking of the life or attempting to take the life of the President, Vice President, or a person in the line of succession to the presidency [R.C. 2901.09], or of the Governor or Lieutenant Governor [R.C. 2901.10], which statutes purport to impose a mandatory penalty of death).

"We have reviewed the record of the proceedings in this case and find ample evidence of guilt of murder in the first degree.

* * *

"It is our conclusion that, except as to the death sentence, the judgment of the Court of Appeals is affirmed. With regard to the death sentence, the judgment of the Court of Appeals must be modified and the sentence is reduced to life imprisonment, as prescribed in R.C. 2901.01."

In *Capler v. State*, Miss., 268 So. 2d 338 (1972), the defendant was convicted of murder and sentenced to suffer death. His conviction and sentence were affirmed by the Supreme Court of Mississippi, which also denied his petition for a rehearing. The Supreme Court of the United States granted his petition for certiorari and ordered "that the judgment of the Supreme Court of Mississippi in this case be vacated insofar as it leaves undisturbed the death penalty imposed and that this cause be remanded to the Supreme Court of the State of Mississippi for further proceedings." *Capler v. Mississippi*, 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862 (1972). This order and mandate followed the decision in *Furman*.

The pertinent Mississippi statute provided: "Every person who shall be convicted of murder shall suffer death, unless the jury rendering the verdict shall fix the punishment at imprisonment in the penitentiary for the life of the convict; or unless the jury shall certify its disagreement as to the punishment as provided by section 1293 [Code of 1930; § 2536, Code of 1942] in which case the court shall fix the punishment at imprisonment for life." Miss. Code of 1942, § 2217 (1957). Upon further consideration, the Supreme Court of Mississippi remanded the case to the trial court for the pronouncement of a judgment of life imprisonment. The rationale of this decision is empitomized by Chief Justice Gillespie in these words: "The only infirmity in section 2217 is that the harsher penalty of death may not lawfully be imposed. The remaining part of the statute is complete, and it does not follow that the remaining provision providing for imprisonment in the penitentiary for the life of the defendant must fall. We hold that because of the decision in *Furman v. Georgia* the death penalty cannot be inflicted; that the remainder of the statute is valid, and the only other punishment for murder is life imprisonment." *Accord, Peterson v. State*, Miss., 268 So. 2d 335 (1972).

In *State v. Square*, La., 268 So. 2d 229 (1972), the defendant's conviction of murder and the death sentence pronounced thereon had been affirmed by the Supreme Court of Louisiana but the Supreme Court of the United States, citing *Stewart v. Massachusetts*, 408 U.S. 845, 33 L.Ed. 2d 744, 92 S.Ct. 2845 (1972), following *Furman v. Georgia*, vacated the judgment insofar as it left undisturbed the death penalty imposed and remanded the case for further proceedings. 408 U.S. 939, 33 L.Ed. 2d 760, 92 S.Ct. 2871 (1972). The pertinent portion

of the Louisiana statute provided: "In a capital case the jury may qualify its verdict of guilty with the addition of the words 'without capital punishment,' in which case the punishment shall be imprisonment at hard labor for life." L.S.A.C.Cr.P. art. 817 (1967).

Upon consideration upon remand, the per curiam opinion of the Supreme Court of Louisiana contains the following:

"We construe the Mandate of the United States Supreme Court to require the imposition of a sentence other than death. Cf., *State v. Shaffer*, 260 La. 605, 257 So. 2d 121 (1971) and *State v. Duplessis*, 260 La. 644, 257 So. 2d 135 (1971).

"Accordingly, in compliance with the Mandate of the United States Supreme Court, the death sentence imposed upon defendant is annulled and set aside, and the case is remanded to the 4th Judicial District Court with instructions to the trial judge to sentence the defendant to life imprisonment.

"Case remanded."

In *Garcia v. State*, 501 P. 2d 1128 (Okla. Crim. 1972), the jury found the defendant guilty of murder and fixed his punishment at death. The pertinent Oklahoma statute provided: "Every person convicted of murder shall suffer death, or imprisonment at hard labor in the State penitentiary for life, at the discretion of the jury. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor, and the judgment of the court shall be in accordance therewith. But upon a plea of guilty the court shall determine the same." 21 Okla. Stat. Ann. § 707 (1958). On 21 June 1972, the Court of Criminal Appeals of Oklahoma affirmed the conviction and death sentence. However, that decision was modified 26 October 1972, on rehearing, at which time the following order was entered: "In the light of *Furman v. Georgia, Jackson v. Georgia*, and *Branch v. Texas* . . . the judgment and sentence of death by electrocution is modified to a term of life imprisonment, and as so Modified, the judgment and sentence is Affirmed." 501 P. 2d at 1141.

In *People v. Speck*, Ill., 287 N.E. 2d 699 (1972), the jury found the defendant guilty of murder in each of eight cases. His convictions and the death sentences pronounced thereon

were affirmed by the Supreme Court of Illinois. However, the Supreme Court of the United States reversed each judgment insofar as it imposed a death sentence.

The pertinent portions of the Illinois statutes (S.H.A. ch. 38 (1972)) are quoted below:

"§ 9-1. *Murder*

* * *

"(b) Penalty.

"A person convicted of murder shall be punished by death or imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years. If the accused is found guilty by a jury, a sentence of death shall not be imposed by the court unless the jury's verdict so provides in accordance with Section 1-7 (c) (1) of this Code."

* * *

"§ 1-7. *Judgment, Sentence and Related Provisions*

* * *

"(c) Capital Offenses.

"(1) Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, the jury may return a verdict of death. Where such verdict is returned by the jury, the court may sentence the offender to death or to imprisonment. Where such verdict is not returned by the jury, the court shall sentence the offender to imprisonment."

Upon remand of the *Speck* case, Justice Schaefer, speaking for the Supreme Court of Illinois, said: "The Supreme Court has now held that a defendant could not be validly sentenced to death under the same Illinois statutes that are applicable to this case. *(Moore v. Illinois* (1972), ... U.S. ....., 92 S.Ct. 2562, 33 L.Ed. 2d 706; *Furman v. Georgia*. . . .) Therefore, the death penalty cannot be reimposed on the defendant, and the only remaining question is the procedure to be followed in resentencing him to a sentence other than death."

In *Commonwealth v. Bradley,* Pa. 295 A. 2d 842 (1972), the jury found the defendant guilty of murder in the first degree and fixed the penalty at death. On direct appeal, the conviction was affirmed but the death sentence was vacated and the *defendant was sentenced to life imprisonment.* The pertinent

portion of the Pennsylvania statute provided: "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall, in the manner hereinafter provided, fix the penalty." 18 Pa. Stat. Ann. § 4701 (1963). The ground of decision was stated by Justice Roberts as follows: "In *Furman v. Georgia,* . . . the United States Supreme Court recently held *that the imposition of the death penalty under statutes such as the one pursuant to which the death penalty was imposed upon appellant is violative of the Eighth and Fourteenth Amendments.* Accordingly, appellant's sentence of death may not now be imposed." 295 A. 2d at 845. (Our italics.) *Accord, Commonwealth v. Sharpe,* Pa., 296 A. 2d 519 (1972); *Commonwealth v. Lopinson,* Pa., 296 A. 2d 524 (1972); *Commonwealth v. Ross,* Pa., 296 A. 2d 629 (1972).

In *Graham v. State,* Ark., 486 S.W. 2d 678 (1972), the jury found the defendant guilty of murder in the first degree and did not recommend a life sentence. The pertinent Arkansas statute provided: "The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment in the State penitentiary at hard labor." Ark. Stat. Ann. § 43-2153 (Repl. 1964). Upon defendant's appeal, the Supreme Court of Arkansas upheld the conviction but remanded the case to the trial court for the pronouncement of a judgment of life imprisonment. The following excerpt from the opinion of Justice Byrd indicates the ground of decision: "[T]he U. S. Supreme Court, as presently constituted, has recently decided that where a jury is permitted to decide between the punishments of life and death, the death penalty constitutes 'cruel and unusual punishment' and that such interpretation is applicable to the several states through the Fourteenth Amendment. See *Furman v. Georgia.* . . .

"So long as the ruling in *Furman v. Georgia, supra,* is made applicable to this State, we are obliged to reduce appellant's sentence from death to life imprisonment as being the next highest available penalty, Ark. Stat. Ann. § 43-2308 (Repl. 1964)." 486 S.W. 2d at 679.

In *State v. Baker,* Wash., 501 P. 2d 284 (1972), the jury found defendant guilty of murder in the first degree and asked that the death penalty be inflicted. The pertinent portion of

the Washington statute provided: "Murder in the first degree shall be punishable by imprisonment in the state penitentiary for life, unless the jury shall find that the punishment shall be death. . . ." R.C. Wash. Ann. § 9.48.030 (1961). Notwithstanding the jury's request, the trial judge deferred imposition of the death penalty on the condition that the defendant be incarcerated for life not subject to parole. The case was before the Supreme Court of Washington on the State's appeal from that order. In remanding the case for a proper sentence in the light of *Furman*, the Court said: "The decision in *Furman* has rendered the issue presented here moot *since the state is now precluded from any attempt to have the death penalty imposed under the existing statute.* The question whether a trial court may defer the death penalty has become academic." *Id.* at 284-85. (Our italics.)

In *Huggins v. Commonwealth*, Va., 191 S.E. 2d 734 (1972), the jury found the defendant guilty of first degree murder and fixed his punishment at death. The pertinent statute provided: "Murder of the first degree shall be punished with death, or by confinement in the penitentiary for life, or for any term not less than twenty years." Va. Code 1950 § 18.1-22. Based on *Furman*, Justice Poff, for the Supreme Court of Virginia, said: "Insofar as it authorized discretionary imposition of the death penalty Virginia's statute is unconstitutional. With respect to the death sentence, the judgment is vacated." *Id.* at 735. The conviction was upheld and the case was remanded for a new trial on the issue of punishment, that is, to determine whether the confinement in the penitentiary was to be for life, or for a term of twenty years, or for a term exceeding twenty years. *Accord, Hodges v. Commonwealth*, Va., 191 S.E. 2d 794 (1972).

Although the above-cited decisions in which death sentences were reversed and sentences of life imprisonment were substituted therefor involved crimes committed prior to *Furman*, none suggests that a death sentence may be imposed and carried out unless and until present statutory provisions are amended. All either state or clearly imply that under existing statutes the death sentence may not be imposed and carried out without regard to whether the crime was committed before or subsequent to *Furman*.

The Florida, Louisiana and Pennsylvania cases discussed below relate to current and future problems of procedure be-

cause of unequivocal holdings that under existing statutes a death penalty cannot be imposed and carried out.

In *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972), Donaldson, who had been indicted for murder in the first degree, filed his petition in the Supreme Court of Florida for a writ of prohibition. Fla. Const. Art. V, § 9(2), vested in the criminal courts of record jurisdiction of "all criminal cases not capital." Fla. Const. Art. V, § 6(3), vested in the circuit courts "all criminal cases not cognizable by subordinate courts." Donaldson asserted that respondent, Circuit Court Judge Sack, had no jurisdiction to proceed with his case because, as a result of the decision in *Furman*, "capital cases" no longer existed in Florida.

On 29 June 1972, when *Furman* was decided, Florida statutes then in force included the following:

"The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082." Fla. Stat. Ann. § 782.04(1) (1972 Supp.).

"Whoever ravishes and carnally knows a female of the age of ten years or more by force and against her will, or unlawfully or carnally knows and abuses a female child under the age of ten years, shall be guilty of a capital felony, punishable as provided in § 775.082. . . ." Fla. Stat. Ann. § 794.01 (1972 Supp.).

"A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court." Fla. Stat. Ann. § 775.082(1) (1972 Supp.).

A Florida statute which became effective 1 October 1972, and is now codified as section 775.082(2) and (3), provided: "(2) In the event *the death penalty* in a capital felony is held to be unconstitutional by the Florida Supreme Court or the

United States Supreme Court, a person who has been convicted of a capital felony shall be punished by life imprisonment.

"(3) In the event *the death penalty* in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment with no eligibility for parole." (Our italics.)

Exerpts from the opinion of Judge Dekle are quoted below.

"Since *Furman v. Georgia* . . . in effect 'removes' (until new legislation which may revive it) 'capital cases,' then there appears to be no logical escape from the fact that our circuit courts at this time, and until any legislation which may revive 'capital cases,' do not have jurisdiction in those cases heretofore delineated as 'capital' and accordingly subsequent to *Furman* jurisdiction in such cases now pending or being filed vests in the courts of record and may be transferred there in those 17 counties of Florida which have such courts."

"We are unable in the face of existing authorities and logic to find support for the continuance of 'capital offense' as heretofore applied. Accordingly, it must fall with the U. S. Supreme Court's holding against the death penalty as provided under present legislation. Our decision is compelled by that Court's action."

"We find no difficulty with a continuation of the *sentencing* for these former 'capital offenses' under § 775.082(1) as automatically life imprisonment upon conviction, inasmuch as that is the only offense left in the statute. . . . The elimination of the death penalty from the statute does not of course destroy the entire statute. We have steadfastly ruled that the remaining consistent portions of statutes shall be held constitutional if there is any reasonable basis for doing so and of course this clearly exists in these circumstances."

"The removal of capital punishment only removes 'capital cases' as that term has been known. The *offense*—and the imposition of a life sentence upon conviction—remains. . . . There simply is not at this time such a designation as a 'capital case' as set forth in the several provisions of our Constitution, statutes and rules."

Since there were no "capital cases" under existing Florida statutes, the court then discusses the drastic impact of its decision upon Florida's Criminal Rules relating to (1) the requirement of twelve jurors in a "capital case," (2) provisions for a speedy trial, (3) jury selection procedures, (4) bifurcated trial procedures, (5) necessity for indictment by a grand jury, and (6) right to bail.

In *Anderson v. State*, 267 So. 2d 8 (Fla. 1972), the Supreme Court of Florida, based on *Furman*, vacated the death sentences of forty defendants. It corrected the sentences of those who had been convicted of murder in the first degree by providing that each be imprisoned for the term of his natural life. In doing so, the Court said: "The elimination of the death penalty from the statute prescribing the penalty for murder in the first degree does not destroy the whole statute. The only sentence which can now be imposed upon conviction of the crime of murder in the first degree is life imprisonment. This is an automatic sentence and a reduction from the sentence previously imposed. The Court has no discretion." The defendants in the rape cases having been convicted for rapes committed prior to 1 January 1972, were subject to imprisonment for life *or* for any term of years within the discretion of the Court. Fla. Stat. Ann. § 794.01 (1944). Their cases were remanded for resentencing.

On authority of *Donaldson* and *Anderson, supra*, the Supreme Court of Florida in *State v. Whalen*, 269 So. 2d 678 (Fla. 1972), held that a trial judge, sitting as sole trier of fact after accepting a plea of guilty to first degree murder and holding an evidentiary hearing on the issue of the extent of penalty, did not have power to impose the death sentence. Chief Justice Roberts said: "This question concerning bifurcated trials is moot since at the present time capital punishment may not be imposed. This Court has held that there are currently no capital offenses in the State of Florida. If there is no capital offense, there can be no capital penalty." *Id.* at 679.

In Ex Parte Contella, 485 S.W. 2d 910 (Tex. Crim. 1972), the appeals were from orders in habeas corpus proceedings in which the accused were denied bail after indictment for murder with malice. The Texas Constitution contained this provision: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident. . . ." A Texas statute provided: "All prisoners shall be bailable unless for capital

offenses when the proof is evident." A capital felony was defined by statute as "(a)n offense for which the highest penalty is death." The cited Texas decisions had held that "[t]he term 'proof is evident' means the accused, with cool and deliberate mind and formed design, maliciously killed the deceased, and that upon a hearing of the facts before the court a dispassionate jury would, upon such evidence, not only convict but would assess the death penalty." Vernon's Ann. P.C. art. 1257 provides: "The punishment for murder shall be death or confinement in the penitentiary for life or for any term of years not less than two." Vernon's Ann. C. Crim. Proc. art. 3707 (1972 Supp.) provides that, in capital cases, where the state has made it known in writing prior to trial that it will seek the death penalty, the punishment must be assessed by the **jury.**

The following excerpts from the opinion of Judge Roberts set forth the disposition of the appeals and the rationale of the decision.

"In the case of *Furman v. Georgia* . . . the United States Supreme Court held that the death penalty, at least insofar as it is currently imposed in this country, 'constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.' That being the case, we conclude that the death penalty, as it is currently authorized, may not be imposed as a penalty for the crime of murder.

"In light of this holding, the question which is before the Court is whether, in terms of our Constitution and statute, bail may now be denied in cases in which, prior to the holding in *Furman v. Georgia, supra,* the death penalty could have been imposed. We conclude that bail may not be denied in such cases.

* * *

"We therefore conclude that bail may no longer be denied on the ground that the offense is a capital offense and the proof is evident. Since the death penalty may not be imposed, there no longer exists a 'capital felony' as defined in Art. 47, V.A.P.C. Likewise, since the death penalty is no longer a possible penalty, it is impossible for the State to offer evidence, in this or any other case, sufficient to establish that the 'proof is evident' as that term is defined in *Ex parte Paul, supra.* Therefore, there is no case in which bail may be denied under the

provisions of Art. 1, Section 11 of the Texas Constitution or Art. 1.07, V.A.C.C.P.

"The orders denying bail are reversed and the trial judge is ordered to set bail herein." 485 S.W. 2d at 911-912.

In *Commonwealth v. Truesdale,* Pa., 296 A. 2d 829 (Nov. 1972), the defendant was awaiting trial on indictments of first degree murder and conspiracy. Under the Pennsylvania Constitution a "capital" offense is not bailable and defendant had been denied bail. After the decision in *Furman,* defendant made an application for his release on bail on the ground that *Furman* abolished the death penalty as it theretofore had existed in Pennsylvania. After a hearing, the trial court granted bail. The Commonwealth immediately filed a petition in the Supreme Court requesting the assumption of plenary jurisdiction to determine whether defendant had a right to bail pending trial. The Court observed that "[w]ith the decision of the United States Supreme Court in *Furman v. Georgia* . . . as well as this Court's decision in *Commonwealth v. Bradley,* Pa., 295 A. 2d 842 (1972), *which cases have invalidated the death penalty as it presently exists in Pennsylvania,* we are left to decide if the definition of 'capital offense' which we adopted in *Alberti* requires that the the bail set for Truesdale was proper." 296 A. 2d at 832 (Our italics.) Holding that bail was properly granted, the Court stated that "since there are presently no criminal offenses in the Commonwealth for which the death penalty may be imposed, there are no 'capital offenses'; hence, by mandate of our Constitution, all offenses are bailable prior to trial." *Id.* The Court clearly recognizes and accepts the fact that the effect of the *Furman* decision was to make "the maximum penalty for murder in the first degree . . . life imprisonment." 296 A. 2d at 835.

In *State v. Holmes,* La. 269 So. 2d 207 (1972), and in *State v. Flood,* 269 So. 2d 212 (La. Nov. 1972), the Supreme Court of Louisiana held that *Furman* did not destroy the classification of certain crimes in Louisiana as capital offenses. The impact of *Furman* was described in these words: "The crime [of murder] remains unchanged; only the penalty has been changed. True, the penalty is what made murder a capital offense, and is not actually a capital offense in Louisiana today. But the *nature* of the offense has not changed—only the punishment." *State v. Flood, supra* at 214. Hence, *Holmes* held that a person charged with a crime formerly punishable by

death had to be tried by a jury of twelve, all of whom must concur to render a verdict; and *Flood* held that a person so charged was not entitled *as of right* to be released on bail.

The majority opinion cites *Delaware v. Dickerson,* Del. Supr., ____ A. 2d ____ (Nov. 1972). This is the only decision disclosed by our research which supports to any extent the view of the majority herein. Dickerson was charged with a first degree murder committed prior to the decision in *Furman.* Two questions of law were certified by the Superior Court to the Supreme Court, to wit: "1. Are the discretionary mercy provisions of 11 *Del.C.* § 3901 unconstitutional under *Furman v. Georgia?* 2. If the answer to Question 1 is yes, is the mandatory death penalty prescribed in 11 *Del.C.* § 571 constitutional?" Both questions were answered "Yes."

11 Del.C. § 571 provided that whoever committed the crime of first degree murder as defined therein "shall suffer death." 11 Del.C. § 3901 provided: "In all cases where the penalty for crimes prescribed by the laws of this state is death, if the jury, at the time of rendering their verdict, recommends the defendant to the mercy of the Court, the Court may, if it seems proper to do so, impose the sentence of life imprisonment instead of death."

The questions certified seem to have been adroitly phrased to elicit the answers which were given. The true question was whether *Furman* had invalidated the death penalty provision of the Delaware statute. All justices (3) of the Supreme Court of Delaware concurred in answering the certified questions as stated above. The majority (2) held that the death penalty could not be applied retroactively to the defendant in the case under consideration. This is an excerpt from the majority opinion: "Having determined that the mandatory death penalty provision of the Murder Statute, standing alone, may not be applied retroactively, we are left with the problem of pointing to the statutory, common law, or inherent power of the Superior Court under which the sentence may be imposed upon a conviction of murder in the first degree for which the mandatory death penalty of the Murder Statute may not be imposed. That question was not certified and was not briefed or argued by counsel." Chief Justice Wolcott dissented from "the majority's conclusion that 11 *Del.C.* § 571 may not be applied retroactively by the courts of this State." His dissent is based on this premise: "The Supreme Court of the United States—

not this Court—has held that the Mercy Statute is unconstitutional. We, of course, are bound by this decision, but we have not made it." Suffice to say, in my view *Furman* held only that *the death penalty provision* of the Delaware statute was invalid. Therefore, as I see it, the holdings of the Supreme Court of Delaware in Dickerson were not required or supported by *Furman.*

I agree that the *Furman* decision has not established the proposition that capital punishment under all circumstances constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Moreover, nothing in the *Furman* decision would seem to invalidate a statute of our General Assembly prescribing death as the sole and exclusive punishment for murder in the first degree, rape, burglary in the first degree, or arson. Whether such a statute should be enacted is for legislative determination. The majority opinion states: "We recognize that the Legislature, not the Courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts." With this statement I emphatically agree. However, in their directive that death shall be the sole and exclusive punishment for all crimes of first degree murder, rape, first degree burglary, and arson, committed *after the filing of this decision,* the majority, in my view, have assumed to act in a legislative rather than in a judicial capacity. Thereby they demonstrate the difference between precept and practice. Of course, the practical effect of today's decision is to place upon those members of the General Assembly who favor the abolition or limitation of capital punishment the burden of initiating and passing legislation to that effect.

It is my view that, unless and until G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58 are amended by our General Assembly, *Furman* requires that trials be conducted solely to determine the guilt of the defendant; and, if found guilty of murder in the first degree, rape, burglary in the first degree, or arson, that the defendant be sentenced to life imprisonment as the only permissible punishment.

Justice SHARP concurring in the opinion of Chief Justice Bobbitt:

I concur fully with the views expressed by the Chief Justice in his well-documented opinion and in his conclusion that the effect of *Furman* is to invalidate the death penalty under the laws of this State as presently written and to make life imprisonment the punishment for first degree murder, rape, arson, and first degree burglary. In signifying my concurrence I add these comments:

In my view, there are no constitutional infirmaties in capital punishment *per se* and, under the conditions prevailing today, I do not consider the death penalty cruel and unusual punishment for the crimes for which the State Constitution authorizes the General Assembly to prescribe it. Thus, were I to permit my personal views on capital punishment as a State policy to dictate my decision in this case, I would have voted with the majority. This, however, I am not at liberty to do.

The majority decision is based upon the supposition that in 1949, when the legislature *rewrote and re-enacted* G.S. 14-21, it would have left the statute unchanged had it known the United States Supreme Court would invalidate the death penalty as authorized in the rewritten section. With all deference, I do not attribute to the majority such occult powers. They cite the failure of seventeen bills or resolutions introduced in the General Assembly to abolish or limit capital punishment. However, they fail to mention the similar fate of the two Judicial Council bills which, in 1969 and 1970, sought to repeal the power of commutation which the legislature had given the jury trying a capital case and to make the death sentence mandatory for the four crimes. In short, the legislature rejected the proposal that capital punishment be retained without the discretionary power in the trial jury to determine whether the convict's sentence should be death or life imprisonment.

The question of capital punishment is one of high public policy, and the constitutional mandate is that it shall be determined by the legislature—not by the judiciary. N. C. Const. art. I, § 6 declares: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." The history of the Supreme Court of North Carolina has been one of judicial restraint and strict adherence to the doctrine of the separation of powers. Our opinions abound with declarations that public policy is the exclusive province of the legislature and its determination is not subject to judicial review; and that the wisdom or impolicy of the law

is solely for the legislature and we have neither the power nor the desire to usurp its prerogative. *See* 2 North Carolina Digest *Const. Law* §§ 6, 10 (1967) and cases cited therein.

This Court, which has consistently deplored the encroachment of other courts upon the legislative prerogatives during the past decade, now follows suit and sets its own example of judicial overreaching by changing the penalty for rape, first degree murder, arson and first degree burglary "from death or life imprisonment in the discretion of the jury to mandatory death." The majority concede that this is "an upward change of penalty" which cannot be applied retroactively. Thus, while giving lip service to the doctrine of separation of powers, this Court does today what the legislatures of 1969 and 1971 declined to do. Had this action been taken by the General Assembly, I would have neither legal nor personal objections. However, when the Court takes such action, in my view, it violates fundamental constitutional principles. I therefore dissent from the conclusion reached by the majority in the advisory opinion.

APPENDIX B

State v. Jarrette

In Full Text

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1974

STATE OF NORTH CAROLINA v. HENRY N. JARRETTE

No. 46

(Filed 25 February 1974)

1. Criminal Law § 92— four offenses — consolidation for trial

The trial court did not err in consolidating for trial charges against defendant for murder, rape, kidnapping and armed robbery where the offenses constituted a continuing criminal episode lasting some two and one-half hours and were so related in time and circumstance as to permit the admission in evidence of each in the trial of the others. G.S. 15-152.

2. Criminal Law § 15; Jury § 2— change of venue — special venire

The trial court in this prosecution for murder, rape, kidnapping and armed robbery did not abuse its discretion in the denial of defendant's motion for a change of venue or for a special venire from another county on the ground of pretrial publicity where the newspaper stories relating to the crimes were within the normal limits of newspaper reporting of criminal activity, the circumstances under which the crimes were committed attracted the attention of all news media of the State, and defendant offered no evidence that such publicity was more widespread in the county of trial than in any other county to which the case might have been removed in accordance with G.S. 1-84.

3. Criminal Law § 15— improper venue — waiver — motion for venue change because of local prejudice

Although another county was the proper venue for trial of defendant on a kidnapping charge, defendant waived venue by going to trial without requesting transfer to the proper county, defendant's motion for change of venue on the ground of local prejudice not being such a request.

4. **Jury § 6— motion to question prospective jurors separately, out of presence of other jurors**

The trial court did not abuse its discretion in the denial of defendant's motion that prospective jurors be questioned separately, out of the presence of other selected or prospective jurors, on the ground a prospective juror right refer during the *voir dire* to what he had read or heard through the news media concerning the defendant's being an escaped prisoner.

5. **Jury § 6— prospective jurors — questions concerning views on capital punishment**

In this prosecution for murder, rape, kidnapping and armed robbery, the trial court did not err in permitting the solicitor to propound questions to prospective jurors concerning their views about the death penalty.

6. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— jurors opposed to capital punishment — challenge for cause**

In a prosecution for murder and rape, the trial court properly allowed the State's challenges for cause to prospective jurors who stated, in effect, that under no circumstances could they vote for a verdict which would result in the imposition of the death penalty.

7. **Criminal Law §§ 34, 128— motion for mistrial — statement by prospective juror**

The trial court did not err in the denial of defendant's motion for a mistrial made on the ground that a prospective juror stated, in the presence of other prospective and selected jurors, that he remembered, he believed, having read that defendant had been declared an outlaw.

8. **Jury § 7— challenge for cause — juror who saw television news report about trial**

The trial court did not err in the denial of defendant's challenge for cause to a juror who had seen a television news report about the case the night before he was called into the jury box where defendant's interrogation of the juror developed no information indicating any prejudice against defendant or any preconceived idea concerning his guilt or innocence, and the juror stated upon inquiry by the court that he could give defendant a fair and impartial trial without being influenced by what he had previously heard.

9. **Criminal Law § 73— declaration of decedent showing intent — exception to hearsay rule**

In a murder prosecution wherein the State's evidence tended to show that the victim was stabbed by defendant while sitting in his brother's car at a launderette, testimony by the victim's brother that, when he borrowed the car and immediately before driving off in it, the victim said he was going to the launderette was admissible as an exception to the hearsay rule and as a part of the *res gestae* of the borrowing and departure.

10. **Criminal Law § 66— pretrial photographic identification — in-court identification — independent origin**

An officer's in-court identification of defendant as the driver of a car which the officer pursued was properly admitted, though the officer had identified defendant from photographs, where the officer's testimony was based on what he saw in the course of his pursuit of the car, there is nothing in the record to indicate that the photographs or the circumstances under which the officer saw them were impermissibly suggestive and there is nothing to indicate a substantial likelihood of irreparable misidentification through inspection of the photographs.

11. **Criminal Law § 34— nonresponsive testimony disclosing defendant is prison escapee**

In a prosecution for murder, rape, kidnapping and armed robbery, the trial court did not err in the denial of defendant's motion for mistrial made on the ground that an F.B.I. agent's nonresponsive statement implying that defendant had escaped from prison constituted inadmissible evidence that defendant had committed a prior criminal offense where the court properly instructed the jury not to consider such statement.

12. **Criminal Law §§ 34, 75— confessions — statements that defendant was prison escapee**

In this prosecution for murder, rape, kidnapping and armed robbery, the trial court did not err in the admission of written and oral confessions containing statements by defendant to the effect that he had escaped from prison where defendant interposed only general objections to testimony relating to the confessions, *voir dire* examinations prior to introduction of the statements show that defendant's concern was directed to whether the statements were voluntary and made with knowledge of defendant's constitutional rights, the trial court found upon supporting evidence that the confessions were not impermissibly obtained, and defendant did not request the court to strike or to instruct the jury to disregard expressions in the confessions showing that defendant was an escaped prisoner; furthermore, the admission of such expressions was harmless in view of the detailed confessions by defendant and the testimony by the rape and kidnapping victim who also witnessed the murder and armed robbery.

13. **Criminal Law § 117— instructions — believing all or none of witness's testimony — omission of "or any part"**

Trial court's omission of the words "or any part" from its instruction that the jury "may believe all that a witness says or you may believe none" was a technical omission which could not have affected the result and did not entitle defendant to a new trial.

14. **Criminal Law § 111; Rape § 6— improper punctuation of instruction — no right to new trial**

Although an instruction as shown in the record would appear to permit the jury to find defendant guilty of rape if defendant put the alleged victim in the back seat of a car by force and against her will rather than requiring the sexual intercourse to be by force and against her will, defendant is not entitled to a new trial where the insertion of commas before and after a phrase in the instruction makes the instruction completely accurate, since the court reporter's punctuation of the judge's charge is not sufficient evidence of error to warrant a new trial.

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15. Rape § 6— failure to submit lesser offense

The trial court in a rape case did not err in failing to submit to the jury the lesser included offenses of assault with intent to commit rape and assault on a female where all the evidence showed completion of the act of sexual intercourse after the victim was abducted, with threats to injure her if she made an outcry, and transported, with her hands tied behind her back, to a remote spot where the act of intercourse was committed, and that defendant had a knife at all times.

16. Homicide § 30— failure to submit second degree murder

The trial court in a prosecution for first degree murder did not err in failing to submit to the jury the question of defendant's guilt of second degree murder where all the evidence was to the effect that defendant stabbed and killed the victim for the purpose of stealing the automobile in which the victim was sitting and that the killing was with premeditation and deliberation.

17. Constitutional Law § 36; Criminal Law § 135— mandatory death penalty for certain crimes — reaffirmation of decision

The decision of *State v. Waddell*, 282 N.C. 431, holding that a defendant lawfully convicted of an offense of first degree murder, rape, first degree burglary or arson committed after 18 January 1973 must be sentenced to death, is reaffirmed. G.S. 14-17; G.S. 14-21; G.S. 14-52; G.S. 14-58.

18. Criminal Law § 138— punishment — construction of State statute — decision of N. C. Supreme Court

The determination of what statutes of this State mean with reference to the punishment to be imposed for criminal offenses is a question of State law and the determination thereof by the N. C. Supreme Court is authoritative.

19. Constitutional Law § 2— construction of State Constitution — decision of N. C. Supreme Court

The meaning of the State Constitution is a matter of State law upon which the decision of the N. C. Supreme Court is final.

20. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — powers of solicitor, jury and Governor

The death penalty is not unconstitutionally discretionary and arbitrary because (1) the solicitor has the power to prosecute for a lesser charge, (2) the jury has the power to acquit or to convict of a lesser charge and (3) the Governor has the power to commute the sentence or grant a pardon.

21. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — number of death sentences

The number of death sentences imposed since the decision of *State v. Waddell*, 282 N.C. 431, does not show that such decision was contrary to the intent of the Legislature.

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22. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — number of death sentences

The small number of death sentences imposed since the decision of *State v. Waddell*, 282 N.C. 431, does not show that the death penalty is imposed arbitrarily in this State.

23. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — imposition on non-whites

There is no merit in defendant's contention that the death penalty is unconstitutional on the ground that those sentenced to death since the decision of *State v. Waddell* are predominantly non-white.

24. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — public opinion

There is no merit in defendant's contention that the death penalty constitutes cruel and unusual punishment because public opinion has overwhelmingly repudiated it, it being clear that there is widespread opinion both in this State and the nation that the death penalty is the appropriate punishment for certain crimes.

25. Constitutional Law § 36; Criminal Law § 135— death penalty — constitutionality — obtaining goals of punishment

There is no merit in defendant's contention that the death penalty for rape and murder is unconstitutional on the ground that it is futile because it is not the most effective means for obtaining the goals of criminal punishment since the Legislature is not required to prescribe the most efficacious punishment for crime but it is sufficient that reasonable men can believe that the punishment prescribed is reasonably adapted to the attainment of the goals of all criminal punishment, and since the statutes prescribing the punishment for murder and rape meet this constitutional standard.

Chief Justice BOBBITT dissenting as to death sentences.

Justices HIGGINS and SHARP join in dissenting opinion.

Justice SHARP concurring further in dissenting opinion.

APPEAL by defendant from *McConnell, J.*, at the 18 June 1973 Criminal Session of UNION. This case was docketed and argued as No. 98 at the Fall Term 1973.

The defendant was found guilty of the rape of Gwendolyn Blackmon, a 16 year old Negro girl; the first degree murder of David Timothy Parker, a 16 year old white boy; the kidnapping of Gwendolyn Blackmon; and the armed robbery of David Timothy Parker. He was sentenced to death for the rape and for the murder and to imprisonment for life for the kidnapping. Prayer for judgment was continued on the charge of armed robbery, the State having relied upon this felony as an essential element of the murder in the first degree. The defendant appealed from all three of the judgments imposed, setting forth

126 assignments of error, many of which were abandoned in his brief. Many others present the same question of law.

Prior to the selection of the jury, the defendant made certain pretrial motions, including a motion for change of venue. From exhibits offered by the defendant in support of this motion, it appears that on 9 February 1973 the defendant was serving a sentence of 23 to 28 years in Odom Prison for two murders by stabbing with a knife, a circumstance not disclosed by the evidence presented in the presence of the jury in the present cases. It further appears from these exhibits that he was permitted to leave the prison on that date to attend a state convention of the Junior Chamber of Commerce (Jaycees), he being an officer in the chapter of that organization established in Odom Prison. While at the convention, he eluded the guard who had accompanied him and escaped. Two days later, he was in Charlotte and engaged in the activities from which the present charges arise. Four days thereafter, he was arrested by agents of the Federal Bureau of Investigation in Memphis, Tennessee. Waiving extradiction, he was returned to Union County for trial.

The defendant offered no evidence before the jury. That introduced by the State showed, in substance, the following:

At approximately 3:30 p.m. on Sunday, 11 February 1973, Gwendolyn Blackmon, a 16 year old Negro high school student, drove alone in her automobile to the Charlotte Public Library. As she was getting out of her car in the parking lot, a man, whom she had never seen before but whom she positively identified, in court, as the defendant, pushed her back into the car, telling her that if she screamed or did not "go along with what he said," he would kill her, tied her hands behind her back, showed her a "scout knife," compelled her to lie down on the seat, took her keys from her purse and drove off with her in the car, telling her he was a sex maniac.

Upon arriving at a location, subsequently pointed out by Gwendolyn Blackmon to the sheriff, on a dirt road in rural Union County, the defendant put the girl into the back seat of the car, disrobed her completely and, with the knife at hand, had sexual intercourse with her, following which he committed an unnatural sexual act upon her. When, prior to these acts, she begged him not to touch her, he replied that he "didn't like for people to beg him, so please stop begging." Following these acts, he instructed her to get dressed and, when she did so, he retied her hands behind her back. They returned to the front seat of the car and the defendant drove to the town of Waxhaw. En route, he told her he wished she were white because, if she were, he would kill her, but "if he could find a way of getting another car," he would give her car back to her and let her go free.

Arriving at the launderette in Waxhaw, the defendant parked beside another car, a 1971 Pontiac Grand Prix, yellow with a cream vinyl top, in which a 16 year old white boy, David Timothy Parker, sat alone. The defendant, taking the keys to Gwendolyn Blackmon's car with him, and leaving her in her car with her hands still tied behind her back, walked over to the boy's car. The Parker boy rolled down his window and the defendant engaged him in a brief conversation. The defendant then pulled the knife from his pants and stabbed the boy twice. The boy tried to get out of the other side of his car but was unable to do so. The blood was gushing from his mouth and nose. The defendant shoved the dying boy over onto the passenger's side of the front seat, got in the car and drove away. He returned momentarily to untie Gwendolyn Blackmon's hands and give her back the keys to her car. Thereupon, she returned to her home in Charlotte and reported what had happened to her parents and to the police.

At about 5:00 p.m. that afternoon, David Timothy Parker had borrowed his brother's 1971 Pontiac Grand Prix, yellow with a white vinyl top, saying he was going to the launderette. On 13 February, his body was discovered in a roadside ditch, 5.4 miles from the Waxhaw launderette. The cause of his death was a deep stab wound in the left chest. The Parker automobile was discovered in Charlotte, the night of 11 February. Its interior was quite bloody. No one other than David Timothy Parker had the owner's permission to drive it.

At approximately 9:00 p.m. on 11 February, Charlotte Police Officers Griffin and Callahan, while patrolling in a police automobile, observed the Parker car parked beside a telephone booth and a man, identified, in court, by Officer Griffin as the defendant, standing in the booth. They turned into the parking lot. As they drew near the Parker automobile, the defendant drove away in it. The officers pursued him with their blue light flashing and horn blowing. They bumped the Parker car several times in unsuccessful efforts to stop it. Finally, the defendant slowed down, jumped from the car and fled on foot. He was

pursued by Officer Griffin but escaped by climbing over a fence which the officer was unable to climb. On the ground at that point, Officer Griffin found a coat containing a name plate bearing the defendant's name. The coat was identified by Gwendolyn Blackmon as the one worn by her assailant. A "hunting knife" was found in the glove compartment of the Parker automobile by the police officers. It was not there when the vehicle was lent by its owner to David Timothy Parker. It was identified by Gwnedolyn Blackmon as the knife used by her assailant in her abduction and in the stabbing of David Timothy Parker.

On 15 February, F.B.I. Agents Phelps and Cooper located and arrested the defendant in Memphis, Tennessee, a warrant charging unlawful flight having been issued for his arrest. The defendant was then carrying in his pocket a kitchen knife with a six-inch serrated blade. Following a voir dire examination, duly conducted, the trial court found that the defendant had been given the full Miranda warning by these officers, had signed a written waiver of his right to counsel prior to interrogation by them, was then not under the influence of intoxicating beverages, was experienced in matters of police interrogation, was well versed in his constitutional rights, was not threatened or promised any reward and signed voluntarily a written statement, which statement was admitted into evidence. It was to the following effect:

While in Raleigh attending a Jaycee meeting, the defendant walked away. By "hitching" rides and traveling by bus, he arrived in Charlotte. There he saw a Negro girl getting out of her car near the library, "told her to shove over and not to holler" or he would hurt her, took her in her car out into the country and there "made love" to her after explaining that he did not want to hurt her. Then he drove on with the girl, in her car, to Waxhaw where they observed a white boy sitting in a car in the parking lot of a launderette. The defendant parked close to the other vehicle, got out, approached the boy, engaged him in a brief conversation, pulled out his knife, stabbed the boy, shoved him over to the passenger's side where he died in two or three minutes, and drove off with the boy's body in the car. After driving around fifteen or twenty minutes, he put the body in the ditch and proceeded back to Charlotte where he stopped at a telephone booth and called his mother in Louisiana. After leaving the telephone booth, he was observed and chased by police officers whom he evaded. He stole another car in Mocksville and drove to Knoxville, Tennessee, where he took a bus to Memphis.

Thereafter, in an oral statement, also found by the court to have been made voluntarily, following the full Miranda warning, the defendant told these F.B.I. agents that after leaving Waxhaw with the body of the Parker boy in the car, he became stuck in a ditch due to snow; a motorist, passing by with his wife and several children, stopped and helped him to get out of the ditch; had the motorist observed the body of the Parker boy in the car, the defendant "would have had to kill the man and his family." He further stated to Agent Cooper that he felt no guilt at the murder of the young boy in Waxhaw, and that if he had the opportunity he would kill Agent Cooper.

On the evening of 11 February, Gwendolyn Blackmon gave to Sheriff Fowler of Union County a statement concerning the abduction, the rape, the murder and the theft of the Parker car which was essentially the same as her testimony in court, above summarized. She then accompanied Sheriff Fowler to and pointed out the place where the rape occurred and the launderette where the stabbing of the Parker boy occurred. At that time, she told the sheriff her assailant was "a black male, with a medium short bush, a mustache" and "a gold tooth with an emblem of a star in the center of it." The defendant has such a tooth.

Sheriff Fowler received the defendant from the federal officers in Memphis and returned him to North Carolina. After a voir dire, duly conducted, the court found as facts that the defendant was given the Miranda warning by the sheriff, signed a waiver of his right to counsel, was not under the influence of any intoxicating beverage or narcotic drug, was intelligent and well educated and that no promises or threats were made to him but that he freely and voluntarily and intelligently made a statement to Sheriff Fowler. Evidence on the voir dire examination supported these findings. The statement of the defendant to the sheriff was then admitted in evidence. It was to the following effect:

The defendant, a colored male born 4 October 1950, completed 12 grades in school. On 9 February 1973, he "escaped from Odom Prison." He went to Charlotte and on 11 February he saw "a small black girl" getting out of her car and told her to get back in. She "hollered" and he told her to shut up or he

would hurt her. She then got back in her car and he tied her hands behind her, told her to lie down in the car, which she did, and he drove away with her. After driving about 15 miles into the country, he told the girl he wanted her car and she could get out but she would not leave her car. He then drove onto a dirt road and parked and told the girl "if she made love" he would not hurt her. Thereupon, he had sexual relations with her. Driving on to Waxhaw, he observed a white boy sitting in a Grand Prix Pontiac car in front of a launderette. He told the girl he had to get another car, so he parked beside the Pontiac, went to the driver's side, told the boy he was having car trouble and asked the boy to help him. When the boy refused, the defendant pulled a "scout knife" from his belt and stabbed the boy twice, once in the upper chest and once in the shoulder. The boy was striking at the defendant when the defendant stabbed him. The wound in the chest killed the boy in two or three minutes. The defendant then told the girl to leave, which she did. Her name was Gwendolyn Blackmon. The defendant then got in the white boy's car and rode around for about 15 minutes before he became stuck in a ditch, from which a passing motorist pulled him. The defendant "was glad the people who pulled him out of the ditch didn't see the body" as he did not know what he might have done to them if they had done so. The defendant then put the body of the white boy in a ditch and drove on to Charlotte where he was chased by but eluded the police officers. Going on to Mocksville he stole another automobile which he drove to Knoxville, Tennessee. From there he took a bus to Memphis where he was arrested.

Attorney General Robert Morgan by Associate Attorney Maddox for the State.

Griffin and Humphries by James E. Griffin and Charles D. Humphries for defendant.

Adam Stein, Julius Levonne Chambers, Jack Greenberg, James M. Nabrit III, Jack Himmelstein, Peggy C. Davis and Anthony G. Amsterdam, attorneys for the NAACP Legal and Educational Fund, Inc., Amicus Curiae.

LAKE, Justice.

The principal thrust of the defendant's brief and the brief of the amicus curiae, in its entirety, are directed against the imposition of the death penalty for the crimes of first degree murder and rape. The defendant's remaining 125 assignments of error are directed to various rulings of the trial court which he contends entitle him to a new trial on all of the charges.

We do not reach the question of the validity of the judgments imposing the death penalty for first degree murder and for rape if the defendant is entitled to a new trial on these charges for the reason that he did not receive a fair trial in accordance with law. Therefore, we turn first to those 125 other assignments of error. Fifty of these are expressly abandoned by the defendant in his brief. Many of the others present the same question of law. Others are purely formal. Due to the gravity of the offenses charged and the punishments imposed, we have carefully considered the entire record and each assignment of error, including those abandoned, to determine whether the defendant is entitled to a new trial on any or all of the charges against him.

[1] Over the objection of the defendant, the State's motion to consolidate for trial the four charges (murder, rape, kidnapping and armed robbery) was granted and the defendant's motion for severance was denied. In these rulings there was no error.

G.S. 15-152 provides:

> "When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated * * *."

The uncontradicted evidence is that the entire series of events comprising the four crimes with which the defendant is charged began at about 3:30 p.m., Eastern Standard Time, on 11 February 1973 and was concluded when it was just dark enough to require lights on automobiles. On that date, this would be approximately two and one-half hours. Obviously, the four offenses constituted a continuing criminal episode. See: *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652; *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406; *State v. White*, 256 N.C. 244, 123 S.E. 2d 483; *State v. Chapman*, 221 N.C. 157, 19 S.E. 2d 250. They were so related in time and circumstance as to permit the admission in evidence of each in the trial of the others. *State*

v. Morrow, 262 N.C. 592, 138 S.E. 2d 245; *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364; *State v. Harris*, 223 N.C. 697, 28 S.E. 2d 232; Stansbury, North Carolina Evidence (Brandis Revision), § 91. Under these circumstances, the consolidation of the cases for trial was within the sound discretion of the trial judge. *State v. Yoes* and *State v. Hale*, 271 N.C. 616, 157 S.E. 2d 386.

[2] There was no error in the denial of the defendant's motions, heard before trial and in the absence of prospective jurors, for removal of the cases to another county for trial and, upon denial of that, for the summoning of a special venire from a county other than Union. The ground stated for each motion was that, due to the publicity in the various news media concerning these offenses and the resulting charges against the defendant, it would not be possible for him to obtain a fair and impartial trial in Union County by a jury composed of its residents. In support of his motion, the defendant offered affidavits and copies of stories appearing in newspapers published in Union County and in Charlotte. The State offered, in opposition, a number of witnesses who expressed the opinion that the defendant could receive a fair and impartial trial in Union County by a jury composed of its residents.

The newspaper stories were not inflammatory in nature. All were well within the normal limits of newspaper reporting of criminal activity. Their substance was as follows: On 9 February 1973, the defendant was serving a term in the Odom State Prison for two murders. While in prison, he became president of a chapter of the Junior Chamber of Commerce (Jaycees), organized within the prison. On 9 February 1973, he was permitted by the prison officials to leave the prison to attend a Jaycee convention in Raleigh, accompanied by a guard. In abuse of the confidence thus placed in him, he eluded the guard at the convention and escaped. Two days later, these criminal offenses occurred and the victim of the kidnapping and rape identified the defendant as the perpetrator of all four of them.

These circumstances attracted the attention of all the news media of the State. The defendant offered no evidence that such publicity was more widespread in Union County than in any other county to which the case might have been removed in accordance with G.S. 1-84. To hold that the defendant could not be tried in a county in which newspapers, carrying stories of

the offenses and charges, circulated would preclude trial in any county of the State.

As the defendant concedes, these motions were directed to the discretion of the trial court. *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123; *State v. Yoes* and *State v. Hale, supra; State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10; *State v. McKethan*, 269 N.C. 81, 152 S.E. 2d 341. There is no indication whatever of abuse of discretion in their denial in the present instance. See: *State v. Blackmon, supra; State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398; *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39.

[3] We observe, though the defendant did not raise the point, that the kidnapping occurred in Mecklenburg County. Thus, Mecklenburg County was the proper venue for the trial of that charge. Venue, however, may be waived by a defendant and is waived by his going to trial without requesting transfer to the proper county. *State v. Ray*, 209 N.C. 772, 184 S.E. 836; Strong, N. C. Index 2d, Criminal Law, § 15. The motion for change of venue on the ground of local prejudice is not such a request. Consequently, placing the defendant on trial in Union County is not ground for a new trial on the charge of kidnapping in this instance.

[4] The defendant next moved, prior to trial, that prospective jurors be questioned separately, out of the presence of other selected or prospective jurors. The ground was that this would avoid possibility that a prospective juror, in response to a question, might refer, in the presence of other prospective or previously selected jurors, to what he had read or heard through the news media concerning the defendant's being an escaped prisoner. This motion also was directed to the sound discretion of the trial judge. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745; *State v. Perry*, 277 N.C. 174, 176 S.E. 2d 729. There was no abuse of discretion in its denial.

[5] Forty-four assignments of error relate to questions propounded by the Solicitor to the prospective jurors as to their views concerning the death penalty. No material difference in these questions is suggested by the defendant and we perceive none. Consequently, these assignments will be discussed together. It is to be observed that these assignments relate, not to the sustaining of a challenge by the State but merely to a propounding of a question to the prospective juror. Obviously, prospective jurors may be asked questions which will elicit information not,

per se, a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges. *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 13 L.Ed. 2d 759; *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833; *State v. Atkinson*, 275 N.C. 288, 308, 167 S.E. 2d 241; G.S. 9-15.

The interrogations to which these assignments of error are directed are typified by the following question propounded to prospective juror, Mrs. McWhorter:

> "Do you have any moral or religious scruples or beliefs against the imposition of the death penalty in certain cases?"

No challenge to a prospective juror was sustained upon an affirmative answer to this question alone. The defendant asserts that merely "to ask such a question violates the spirit of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776." We do not so construe either the letter or the spirit of the Witherspoon decision. We have held many times that there is no error in permitting questions to be propounded to prospective jurors concerning their views about the death penalty. *State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345; *State v. Yoes* and *State v. Hale*, *supra*, at p. 643; *State v. Spence*, 271 N.C. 23, 155 S.E. 2d 802. We consider below the effect of the Witherspoon decision upon rulings of the Superior Court sustaining challenges to prospective jurors following their responses to other questions propounded by the Solicitor.

[6] The defendant assigns as error the court's sustaining of the Solicitor's challenges to prospective jurors Baucom, Haigler, Mosley, Mrs. McWhorter and Mrs. Purser, contending that the allowance of such challenges for cause violated "the spirit of Witherspoon." There was no material difference in the questions and answers upon the basis of which these five challenges for cause were sustained. Those here quoted, directed to and given by prospective juror Baucom, after he had stated that he did not believe in the imposition of the death penalty, are typical:

> "Q. On account of that moral or religious scruple, or scruples would it be impossible under any circumstances and in any event for you to return a verdict of guilty of murder in the first degree and rape knowing at the time that the defendant would be sentenced to death?
>
> "A. Yes, sir, I couldn't do it.
>
> * * *
>
> "Q. If you were chosen to sit on this jury, are you saying that you would not under any circumstances give any consideration to returning a verdict which would involve the death penalty?
>
> "A. No, sir.
>
> "Q. That is what you are saying?
>
> "A. That is what I am saying, I couldn't do it."

The sustaining of the challenges for cause to these five prospective jurors, in view of their responses on voir dire, was not a violation of either the letter or the spirit of *Witherspoon v. Illinois, supra*. As the defendant concedes, these rulings were in accord with our decision in *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487. They were also in accord with our similar rulings in *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336; *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289; *State v. Frazier*, *supra*; *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671; *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572, and many other recent decisions.

[7] The defendant assigns as error the denial by the Superior Court of his motion for a mistrial due to a response by juror Larry McCoy to a question by the defendant before he was accepted as a juror. After Mr. McCoy had stated that he had heard about the case and probably had read it in the newspaper but had not seen it on television or heard it on radio, the interrogation proceeded as follows:

> "Q. At the time you read about it did you form an opinion as to this man's innocence or guilt?
>
> "A. Yes, sir.
>
> "Q. Do you still have that opinion?
>
> "A. No, sir.
>
> "Q. What stage did you cease to have it?
>
> "A. No answer.

"Q. You said you had formed an opinion as to his innocence or guilt but now you do not have it any longer. Did you just forget what you had read—

"A. Yes, sir. I didn't recall exactly what I had read now.

"Q. And you are saying that you cannot now recall what you read about this case?

"A. Not word for word. The main part that I remember was what stuck in my mine [sic], I believe he was declared an outlaw. Is that not true? That's the part that stuck in my mind."

"MR. GRIFFIN (counsel for defendant): I move for a mistrial, your Honor.

"COURT: MOTION DENIED. EXCEPTION.

"Q. Mr. McCoy, as you sit there now do you have an opinion as to this man's innocence or guilt?

"A. No, sir.

"Q. Could you take what you read as being evidence of his innocence or guilt?

"A. No, sir."

The defendant did not elect to challenge this juror for cause or peremptorily. He had not at that time exhausted his peremptory challenges. Mr. McCoy served on the jury.

This assignment of error is not directed to Mr. McCoy's service on the jury. It is directed to the denial of the defendant's motion for mistrial for his statement, in the presence of other prospective and selected jurors, that he remembered, he believed, having read that the defendant was declared an outlaw.

A mistrial is not lightly granted. The granting of the defendant's motion therefor rests largely in the discretion of the trial judge. *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93; Strong, N. C. Index 2d, Criminal Law, § 128. We see no error in the denial of the motion in this instance.

[8] The court denied the defendant's challenge for cause to juror Frank Parker. The ground for challenge was that Mr.

Parker, a member of the special venire, drawn and summoned after the regular panel was exhausted, had seen a television news report about the case the night before he was called into the jury box. Nothing whatever in the record suggests the nature of the television newscast so heard, nor does it appear that Mr. Parker had been summoned for jury duty prior to listening to the newscast. The defendant interrogated Mr. Parker at considerable length and no information was developed indicating any prejudice against the defendant, any preconceived idea concerning his guilt of innocence, or other ground for challenge. After the conclusion of the defendant's interrogation of this juror, the court interrogated him as follows:

"COURT: I'd like to ask him a question. In view of the fact you heard something on the television last night about the trial, and this is the time when the jury is being selected, no evidence has been presented, do you feel that you can sit and hear the evidence as it comes from the witness stand and give this defendant a fair and impartial trial without being influenced in any way by what you previously heard?

"A. Yes, sir, I could.

"COURT: Including what you heard last night on the television?

"A. Yes, sir."

There was no error in denying the defendant's challenge for cause to this juror. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561; *State v. DeGraffenreid*, 224 N.C. 517, 31 S.E. 2d 523.

Gwendolyn Blackmon, after testifying that the defendant, positively identified in court by her, kidnapped and raped her, testified that she saw him walk up to and stab, with his knife, a white boy sitting in a "1971 Grand Prix, yellow with a cream vinyl top," parked in the parking lot of a launderette (identified by her as the launderette in Waxhaw). She further testified that, as a result, blood gushed from the mouth and nose of the boy and the defendant got in the boy's car and, after shoving his body over into the passenger's seat, drove away. The boy so stabbed wore a cap similar in appearance to that found on the body of David Timothy Parker as it lay in a roadside ditch some five miles from the launderette.

The Parker boy's brother testified that he, himself, was the owner of such an automobile and had lent it that afternoon to

David Timothy Parker. This automobile was recovered that evening by police officers in Charlotte after the defendant, who was driving it, had fled from it. It was heavily blood stained, not having borne such stains at the time the owner lent it to David Timothy Parker. The cause of the Parker boy's death was a stab wound in the chest.

[9] Over objection, the brother of David Timothy Parker was permitted to testify that, when he borrowed the car and immediately before driving off in it, David Timothy Parker said he was going to the launderette in Waxhaw. The ground of the defendant's objection was that this was hearsay evidence, which, of course, it is. It is, however, within an exception to the hearsay rule noted by us in *State v. Vestal*, 278 N.C. 561, 581-590, 180 S.E. 2d 755. It was also admissible as part of the *res gestae* of the borrowing and departure. Annot., 163 A.L.R. 15, 21. If it were not admissible under either of these exceptions to the hearsay rule, its admission would be, at most, harmless error. The only effect of the evidence would be to tend to identify David Timothy Parker as the boy whom the defendant stabbed. As above noted, the other evidence in the case established this fact beyond controversy. There is no merit in this assignment of error.

[10] Officer Griffin of the Charlotte Police Department testified that on 11 February 1973 at approximately 9:00 p.m., he and another officer were patrolling in a police vehicle as a result of a call they had received. He observed the Parker automobile parked beside a telephone booth at a service station. In the booth was a Negro man. As they pulled into the parking lot for the purpose of questioning the man, he got in the car and drove off. They pursued him and at one point drew parallel with the other automobile on its left side. At that point the other car turned into the path of the police car and struck it, then speeding off.

Officer Griffin was seated in the passenger's seat of the police vehicle. Thus, he was immediately next to the driver of the other vehicle when the two cars were parallel and in collision. He testified that he had an opportunity to see the face of the driver of the other vehicle. The police officers continued the pursuit, bumping the Parker car several times in unsuccessful efforts to stop it. Finally, it slowed down and the driver jumped out and fled on foot. Officer Griffin pursued him on foot, drawing within ten feet of him. He unequivocally identified the defendant in court as the man who was driving the Parker car. To this evidence, there was no objection.

On cross-examination, Officer Griffin testified that he saw the defendant at a distance of about ten feet for four to five seconds while pursuing him on foot. There were street lights in the area. He then testified: "My indetification of that subject as being the defendant is not based on my observation of that driver for four to five seconds. I am basing my identification on pictures that I saw of the suspect. My identification is not based strictly on what I saw that night." Thereupon, the defendant's counsel moved to strike the officer's in-court identification of the defendant and the court conducted a voir dire examination of the officer.

On such voir dire, the officer testified that his identification of the defendant as the man he so pursued in Charlotte on the night of February 11, 1973 was based upon what he saw that night as he and his companion were chasing the car, that he saw photographs of the defendant later, but his in-court identification of the defendant as the man he so pursued was based "solely on my observation, seeing him in that car that night." He then described the appearance of the driver of the other vehicle as he saw him in the car and again identified the defendant as the man he then saw. Upon this evidence, the court overruled the motion to strike. In this ruling we find no error.

Although the trial judge should have made specific findings of fact following the voir dire, his overruling of the motion to strike, under the circumstances, necessarily implies the finding that the in-court identification by the witness was based on what the witness saw in the course of the pursuit of the other vehicle and its driver. The evidence is ample to support such finding. Furthermore, there is nothing whatever in the record concerning the nature of the pictures he saw later, or to indicate that these, or the circumstances under which he saw them, were impermissibly suggestive. The in-court identification had an independent origin. There is nothing to indicate a substantial likelihood of irreparable misidentification through the subsequent inspection of photographs. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247; *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634. Finally, as to this point, Officer Griffin's identification of the defendant, as the man he pursued, is corroborated by his finding of the defendant's coat on the ground at the point where the fleeing man jumped over

a fence and thus escaped. It is further corroborated by the defendant's own statement to Sheriff Fowler, discussed below.

The next three assignments of error are directed to the admission of statements made by the defendant to the agents of the Federal Bureau of Investigation who arrested and interrogated him.

Agent Phelps of the Federal Bureau of Investigation, who arrested the defendant in Memphis, Tennessee, testified concerning both an oral statement and a written statement given by the defendant to the witness as the result of in-custody interrogation. Before admitting this evidence, the court conducted voir dire examinations and made full findings of fact. He found that, before such interrogation, the F.B.I. agents conducting the interrogation gave the defendant the full warning required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694. He further found that the defendant signed a written waiver of his constitutional rights, including his right to have an attorney present at the interrogation, and that the defendant made the statements, oral and written, freely, voluntarily and intelligently. These findings, being fully supported by the evidence on the voir dire examination, are conclusive on appeal. *State v. Fox, supra; State v. Gray*, 268 N.C. 69, 79, 150 S.E. 2d 1; *State v. Barnes*, 264 N.C. 517, 142 S.E. 2d 344; *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572. An in-custody confession is competent if made voluntarily after the defendant has been given proper warning of his constitutional rights and has full knowledge thereof. *State v. Chance*, 279 N.C. 643, 661, 185 S.E. 2d 227; *State v. Murry*, 277 N.C. 197, 176 S.E. 2d 738; *State v. Gray, supra.*

The defendant does not contend that the statements were not voluntary or that they were made without full knowledge of his constitutional rights. His contention is that it was error to permit Agent Phelps to read to the jury the written confession, consisting of five pages of detailed account of the defendant's activities from the abduction of Gwendolyn Blackmon to the arrest of the defendant in Memphis, because it includes the defendant's statement, "[W]hile I was attending a J.C. Day in the General Assembly in Raleigh, North Carolina, at the Hilton Inn, I walked away." It is his contention that this "shows escape and previous convictions," evidence of which would not be admissible.

As a matter of fact, the written confession also states that the defendant telephoned his mother in Louisiana and told her he had "escaped from prison" and that he told the woman, in whose house he was arrested in Memphis, that he "had just got out of prison."

Agent Phelps also testified that, in his oral statement, the defendant "told us that on February 9, 1973 that while he was in Raleigh attending a Jaycee meeting he walked away from the guards that were there." The defendant's contention on appeal is that this is also inadmissible evidence of his having committed some prior criminal offense. (At no time was there any evidence before the jury as to the nature of the prior offenses.)

[11] Finally, in this connection, the defendant assigns as error the denial of his motion for a mistrial for the reason that Agent Phelps testified, "We asked Mr. Jarrette if he would relate to us details surrounding the time of his escape until the time [of his arrest in Memphis]." Again, the contention of the defendant is that such testimony was inadmissible evidence to the effect that the defendant had committed previously some criminal offense. The circumstances of this ruling are disclosed by the record to have been as follows:

After the court had conducted the voir dire examination concerning the defendant's oral statement to the F.B.I. agents, and had ruled evidence thereof admissible, the jury returned to the courtroom and Agent Phelps resumed his testimony. The record shows the following took place:

> "Q. Thereafter, after the defendant placed his signature at or near the bottom of State's Exhibit 18 [the signed waiver of his constitutional rights], Mr. Phelps, what, if any, statement *did he make to you?* [Emphasis added.]
>
> "OBJECTION. OVERRULED.
>
> "Q. Go ahead.
>
> "A. At that time *we asked* Mr. Jarrette if he would relate to us details surrounding the time of his escape until the time—[Emphasis added.]
>
> "OBJECTION.
>
> "COURT: If he would relate to you what?
>
> "A. If he would relate to us the events that evolved from the time he had escaped until the time he was arrested.

"MR. GRIFFIN [defendant's counsel]: Move that that portion 'escaped' be stricken.

"COURT: You will not consider his statement as to 'escaped.'

"Q. Mr. Phelps, my question is what, if any, statement did he make, not what you said.

"MR. GRIFFIN: I'd like to get—

"COURT: You will not consider any statement that Officer Phelps made asking the defendant to relate the events subsequent to an escape.

"MR. GRIFFIN: I would like the record to show that I made a motion to a mistrial at this time.

"COURT: MOTION DENIED. EXCEPTION."

It is, of course, the general rule that upon the trial of a criminal charge, the defendant not having taken the stand as a witness, evidence of his bad character is not competent and, for this reason, the State may not introduce evidence showing that he committed an unrelated criminal offense. *State v. McClain, supra;* Stansbury, North Carolina Evidence (Brandis Revision), § 91. However, Agent Phelps' statement inferring that the defendant had escaped from prison was not responsive to the question propounded to him by the Solicitor. Immediately, upon motion of the defendant's counsel, the court properly instructed the jury not to consider this statement. We find in this circumstance no ground for a mistrial. *State v. Self, supra.*

[12] Thereupon, Agent Phelps, in response to the Solicitor's question, related to the jury the detailed, oral statement of the defendant to him, including the words, "[W]hile he was in Raleigh attending a Jaycee meeting he walked away from the guards that were there." At the conclusion of the witness' answer, the defendant made a motion to strike the entire answer, but not a motion to strike the statement that the defendant had walked away from the guards.

Again, when the defendant's written confession was introduced in evidence, there was a general objection only and, after it was read, a general motion to strike the entire answer. The court was not requested to strike or to instruct the jury to disregard the expressions therein that, while attending the Jaycee

meeting in Raleigh the defendant "walked away," that he telephoned his mother and told her he had "escaped from prison" and had told the woman, in whose home he was arrested in Memphis, that he "had just got out of prison."

The earlier ruling by the court, concerning Agent Phelps' non-responsive use of the word "escape," shows clearly that, had the defendant requested him to do so, the judge would have stricken from the written confession the above quoted words contained therein. Nothing in the record indicates that these particular expressions in the written document were called to the court's attention. The objection was to the introduction of the document in its entirety and the evidence on the voir dire examinations, conducted with reference both to the oral and to the written statements of the defendant to the officers, gave the court to understand that the defendant's objections were to the statements in their entirety and on the ground that they were impermissibly obtained, not to any specific words therein. "When testimony or a document is inadmissible only in part, the objection should specify the objectionable part; and if it is not so confined, it is not error to overrule it." Stansbury, North Carolina Evidence (Brandis Revision), § 27. In *Nance v. Telegraph Co.*, 177 N.C. 313, 98 S.E. 838, this Court said, "[W]here a part of testimony is competent, although the other part of it may not be, an exception is taken to all of it, it will not be sustained. * * * We will not set off the bad for him and consider only that much of it, upon the supposition that his objection was aimed solely at the incompetent part."

It will be observed that in these three assignments of error the defendant is not asserting that his constitutional rights have been denied or violated. He does not contend that the statements by him to the interrogating officers were involuntary, or that they were made without full knowledge of his constitutional rights. His contention is simply that, in these instances, evidence tending to show that he had previously committed some undesignated criminal offense was improperly placed before the jury. Under the circumstances, these assignments are without merit.

As the Supreme Court of the United States said in *Bruton v. United States,* 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed. 2d 476, "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every

trial where inadmissible evidence creeps in, usually inadvertently. 'A defendant is entitled to a fair trial but not a perfect one.' *Lutwak v. United States,* 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593."

In *Schneble v. Florida,* 405 U.S. 427, 432, 92 S.Ct. 1056, 31 L.Ed. 2d 340, the Court, after referring to the above statement in the Bruton case, supra, said:

> "Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. * * * In this case, we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to Snell's admission been excluded. The admission into evidence of these statements, therefore, was at most harmless error."

In view of the detailed confession by the defendant and the testimony of Gwendolyn Blackmon, it is inconceivable that had the jury never heard these objectionable statements relating to the defendant's being an escaped prisoner, they would have rendered verdicts other than those which they did return.

Sheriff Fowler testified that after he returned the defendant to Union County, he also warned the defendant of his constitutional rights, in compliance with *Miranda v. Arizona, supra,* and the defendant signed another written waiver thereof, including his right to have counsel present at the interrogation. Thereafter, the defendant made an oral statement which the Sheriff reduced to writing but the defendant did not sign. Upon objection being interposed, the court conducted another full voir dire examination and thereafter made full findings of fact, fully supported by the evidence on the voir dire examination, to the effect that such statement was made voluntarily and intelligently, after the giving of the requisite warning concerning his constitutional rights. The court then overruled the objection to the testimony of the Sheriff concerning such statement. The Sheriff thereupon related to the jury the statement so given him by the defendant which included the following:

> "I, Henry Jarrette, escaped from Odom Prison February 9, 1973. I, Jarrette, was at the Jaycee Day in the General Assembly in Raleigh. I, Jarrette, escaped because of the prison conditions. After I escaped, I, Jarrette, went to Charlotte * * * ."

Here, again, the objection was general and the defendant's motion to strike was directed to the entire statement. The lengthy voir dire examination of Sheriff Fowler, prior to the introduction of this testimony, clearly indicates that the defendant's concern was directed to whether the statement was voluntary and made with knowledge of the defendant's constitutional rights. For the reasons above mentioned, this assignment of error also is without merit.

The court, in its charge to the jury, said:

> "You may believe all that a witness says or you may believe none. You are to weigh the evidence and find where the truth lies. * * * ."

[13] The defendant assigns this as error, saying the court should have charged, "You may believe all, *or any part,* or none of what a witness says." (Emphasis added.) While the instruction suggested by the defendant would have been correct, and an improvement upon that actually given, we do not think the jury was misled by the omission of the words "or any part." This was a technical omission, not substantial, and could not have affected the result. Consequently, the defendant is not entitled to a new trial on account of it. *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577; *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765; *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593. At the conclusion of its entire charge, the court asked counsel if any further instructions were requested. Both the Solicitor and counsel for the defendant replied in the negative.

[14] The record shows that the court, in its charge to the jury, said:

> "If the State has satisfied you from the evidence and beyond a reasonable doubt that on or about the 11th day of February, 1973, the defendant, after tying the hands of Gwendolyn Blackmon, carrying her from Charlotte into Union County, and showing her a hunting knife, that he took off her clothes and had sexual relations with her in the back seat of the car after placing her in the back seat by the use of force and without her consent and against her will, he would be guilty of rape."

The defendant assigns this as error, contending that under this instruction the jury might have found the defendant guilty of rape if the defendant put the girl in the back seat of the car

by the use of force and without her consent and against her will, even though the act of intercourse was not with force and was with her consent. It will be observed that the insertion of commas before and after the phrase "after placing her in the back seat" makes the charge, on this point, completely accurate. The court reporter's punctuation of the judge's charge, standing alone, is not sufficient evidence of error to warrant a new trial. In the immediately preceding paragraph of the charge, the judge fully and accurately defined the crime of rape. It is not conceivable that the jury was misled by the above quoted portion of the charge.

[15] The above defendant assigns as error the failure of the trial court to charge the jury that the defendant might be found guilty of assault with intent to commit rape or of assault on a female. There is no merit in this contention. These are lesser offenses included in the offense of rape. However, it is not necessary for the court to submit to the jury a lesser, included offense, or to instruct the jury thereon, where there is no evidence tending to show the defendant may be guilty of such lesser offense. *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235; *State v. Murry, supra;* Strong, N. C. Index 2d, Criminal Law, § 115.

All of the evidence, including the statements given by the defendant to the arresting officers in Memphis and to Sheriff Fowler, shows completion of the act of sexual intercourse after the girl was abducted, with threats to injure her if she made an outcry, and transported, with her hands tied behind her back, to a lonely spot on a rural road where the act of intercourse was committed. The girl's testimony was that at all times the defendant exhibited to her, or had at hand, the knife with which he subsequently stabbed the Parker boy to death. The defendant's own statements were to the effect that he told her that *if she submitted*, he would not hurt her. There is no evidence whatever that she yielded except through fear of serious injury. Under these circumstances, it was not error to fail to charge the jury concerning the lesser included offenses and to instruct them that on the charge of rape they might return a verdict of guilty of rape or a verdict of not guilty. *State v. Bryant*, 280 N.C. 551, 556, 187 S.E. 2d 111; *State v. Carnes, supra;* Strong, N. C. Index 2d, Criminal Law, § 115.

[16] There was likewise no error in the court's failure to submit to the jury the question of the defendant's guilt of second

degree murder, and to instruct the jury thereon. All of the evidence, including the statements by the defendant to the arresting officers and to Sheriff Fowler, is to the effect that the defendant stabbed and killed David Timothy Parker for the purpose of stealing the automobile in which the Parker boy sat and in the accomplishment of that purpose. The larceny of the automobile under these circumstances was robbery. G.S. 14-87; *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809. A murder committed in the perpetration of a robbery is murder in the first degree. G.S. 14-17. *State v. Rich*, 277 N.C. 333, 177 S.E. 2d 422. The evidence, furthermore, shows clearly that the killing of the Parker boy was with premeditation and deliberation. There being no evidence whatever of a lesser degree of homicide, it was not error for the court to fail to instruct the jury concerning the lesser degrees of homicide and to instruct them that, on the charge of murder, they might return a verdict of guilty of murder in the first degree or a verdict of not guilty.

The defendant's remaining assignments of error, relating to the denial of his motions for nonsuit as to each of the charges, to instructions of the court to the jury and to rulings and procedures prior to the entry of the judgments, have all been carefully examined, whether abandoned by the defendant in his brief or not. There is no merit whatever in any of them. It would serve no useful purpose to discuss them individually. The verdicts of guilty of kidnapping, rape, murder in the first degree and armed robbery are each fully supported by the evidence. The record shows that the defendant received, on each charge, a fair trial in accordance with the law of this State. The record discloses no basis for disturbing any of the verdicts or the granting of a new trial upon any of the four charges.

We are thus brought to the defendant's principal contention, the sole contention of the amicus curiae, that even though the defendant received a fair trial, free from error, and, consequently, stands properly convicted of murder in the first degree and of rape, it was error to enter judgments on these charges sentencing him to death, and so, in Case No. 73CR1342 (murder) and Case No. 73CR1339 (rape), the judgments entered should be vacated and the cases remanded for judgments sentencing the defendant to imprisonment for life.

It will be noted that this assignment of error has no relation to the judgment imposing a sentence to imprisonment for life in

Case No. 73CR2843 (kidnapping). It will also be noted that in Case No. 73CR1341 (armed robbery) prayer for judgment was continued, this offense having been used by the State as an element of the crime of murder in the first degree.

In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, the Supreme Court of the United States held that the Eighth and Fourteenth Amendments to the Constitution of the United States forbid a state to inflict the penalty of death if, under the law of the state, either the jury or the judge is permitted, as a matter of discretion, to choose between the imposition of the death penalty and the imposition of the penalty of imprisonment. Each of the nine Justices, five concurring in the decision and four dissenting therefrom, wrote a separate opinion. The five Justices concurring in the decision did not agree, among themselves, as to the basis upon which the decision rests.

It is neither the function nor the purpose of this Court to defend or justify Furman, the stated reasons for it or the results which have flowed from it. Our function and intent has been, and is, to comply with it and to determine its effect upon the statutes of North Carolina, which expressly provide what penalty is to be imposed upon a defendant lawfully convicted of first degree murder, rape, first degree burglary or arson. G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58.

Pursuant to Furman, we have received from the Supreme Court of the United States, and have complied with, mandates to vacate sentences of death affirmed by us prior to that decision. *State v. Frazier*, 283 N.C. 99, 195 S.E. 2d 33; *State v. Miller*, 281 N.C. 740, 190 S.E. 2d 841; *State v. Hamby and Chandler*, 281 N.C. 743, 191 S.E. 2d 66; *State v. Chance, supra; State v. Westbrook, supra; State v. Doss*, 281 N.C. 751, 191 S.E. 2d 70. In other cases, reaching this Court after the decision in Furman, involving offenses committed prior to our decision in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, we have, in conformity thereto, vacated death sentences, and, having found no error in the trial, remanded the matters to the Superior Court for the imposition of sentences to life imprisonment. *State v. Blackmon*, 284 N.C. 1, 199 S.E. 2d 431; *State v. Watkins*, 283 N.C. 504, 196 S.E. 2d 750; *State v. Waddell, supra; State v. Carter*, 282 N.C. 326, 193 S.E. 2d 85. See also: *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725; *State v. Washington*, 283 N.C.

175, 195 S.E. 2d 534; *State v. Talbert*, 282 N.C. 718, 194 S.E. 2d 822.

Prior to 1949, the imposition of a sentence to death was mandatory, in this State, upon a conviction of first degree murder or rape. In 1949, the Legislature inserted a proviso in the statutes relating to the punishment of first degree murder and rape, similar provisions having been inserted earlier into the statutes relating to first degree burglary and arson. As so amended, G.S. 14-17 (relating to murder), at the time of Furman read:

> "A murder * * * which shall be committed in the perpetration or attempt to perpetrate any * * * robbery * * * shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

G.S. 14-21 (relating to rape), as so amended, was to the same effect, so far as punishment is concerned.

At the time *Furman v. Georgia, supra*, was decided, this Court had held in numerous decisions that the effect of the proviso, inserted into these statutes by the 1949 amendment, and the effect of the like provisos previously inserted in G.S. 14-52 (burglary) and G.S. 14-58 (arson), was to confer upon the jury in each case the absolute, "unbridled" discretion to fix the punishment at either death or imprisonment for life. *State v. Manning*, 251 N.C. 1, 110 S.E. 2d 474; *State v. Denny*, 249 N.C. 113, 105 S.E. 2d 446; *State v. Conner*, 241 N.C. 468, 85 S.E. 2d 584; *State v. Simmons*, 234 N.C. 290, 66 S.E. 2d 897; *State v. McMillan*, 233 N.C. 630, 65 S.E. 2d 212; *State v. Shackleford*, 232 N.C. 299, 59 S.E. 2d 825; *State v. Mathis*, 230 N.C. 508, 53 S.E. 2d 666. This, Furman held, the State may not do by reason of the Eighth and Fourteenth Amendments to the Constitution of the United States.

The question was therefore presented, as a result of *Furman v. Georgia, supra*. What part of G.S. 14-17 (murder) and what part of G.S. 14-21 (rape), if any, remains the law of North Carolina? That question came before this Court and was determined by us in *State v. Waddell, supra*.

While the decision in *State v. Waddell, supra,* was not unanimous, no member of this Court took the view that Furman invalidated G.S. 14-17 or G.S. 14-21 in its entirety. All of the members of this Court agreed that, notwithstanding Furman, these statutes remain in the law of North Carolina, in part, and only in part. The difference of opinion among the members of this Court was as to which part of each such statute remained the law of this State, the original provision making death the mandatory punishment, or the proviso, added by the 1949 amendment, which attempted to confer upon the jury the discretion forbidden by Furman. It was the view of the majority of this Court that the portion of each of these statutes which survived Furman, and remained the law of North Carolina, was the original provision making the death penalty mandatory and *State v. Waddell, supra,* so decided. The Supreme Court of Delaware reached the same conclusion as to the effect of *Furman v. Georgia, supra,* upon the similar statutes of that State. *State v. Dickerson* (Del.), 298 A. 2d 761.

To avoid another, and different, serious question of constitutional validity, should we give *State v. Waddell, supra,* retroactive effect, we there held that our decision would not be retroactive and that, consequently, the death penalty would be imposed only in cases where the offense was committed after the date of that decision (18 January 1973). To the same effect, see *State v. Dickerson, supra.*

[17] The reasons for our decision in *State v. Waddell, supra,* are fully set forth in the opinions therein and need not be recounted here. Having given full consideration to the brief and oral argument of the defendant and to the brief of the amicus curiae, requesting us to reconsider *State v. Waddell, supra,* we now reaffirm that decision and hold that the meaning of G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58, in the light of the decision of the Supreme Court of the United States in *Furman v. Georgia, supra,* is that a defendant, lawfully convicted of first degree murder, rape, first degree burglary or arson, the offense having been committed after 18 January 1973, must be sentenced to death, the trial judge having no discretion in the matter of the sentence to be imposed and the jury having no authority to fix a different punishment.

[18] The determination of what the statutes of this State mean, with reference to the punishment to be imposed for criminal

offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. *Adderly v. Florida,* 385 U.S. 39, 46, 87 S.Ct. 242, 17 L.Ed. 2d 149, reh. den., 385 U.S. 1020, 87 S.Ct. 698, 17 L.Ed. 2d 559; *Shuttlesworth v. Birmingham,* 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed. 2d 176.

Having determined that the defendant has been lawfully and fairly convicted of first degree murder and of rape and having determined that G.S. 14-17 and G.S. 14-21 require a defendant so convicted to be sentenced to death, the question then becomes whether the imposition of such sentence in this case violates any provision of the Constitution of North Carolina or of the Constitution of the United States.

[19] The Constitution of North Carolina, Article XI, §§ 1 and 2, expressly permits the imposition of the death penalty upon conviction of first degree murder or upon the conviction of rape. The meaning of the State Constitution is also a matter of State law upon which the decision of this Court is final.

The contention of the defendant, and of the amicus curiae, is that a State statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

Furman v. Georgia, supra, does not so hold, only two of the nine Justices (Mr. Justice Brennan and Mr. Justice Marshall) indicating such a view in their opinions in that case. No other decision of the Supreme Court of the United States so holds. This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must do so in the light of decisions heretofore rendered by that Court.

The arguments of the defendant and of the amicus curiae, in support of their position on this question, may be summarized as follows: (1) Although G.S. 14-17 (murder) and G.S. 14-21 (rape), as construed in *State v. Waddell, supra,* make the imposition of the death sentence mandatory upon conviction of first degree murder or rape, the death penalty is nevertheless discretionary and selective because (a) the Solicitor has the power to prosecute for a lesser charge, (b) the jury has the power to acquit or to convict of a lesser charge, and (c) the

Governor has the power to commute the sentence or grant a pardon; (2) since our decision in *State v. Waddell, supra,* the death sentence has been imposed in North Carolina more frequently than was the case prior to the decision in *Furman v. Georgia, supra,* from which it is concluded that our construction of these statutes is contrary to the legislative intent; (3) nevertheless, since *State v. Waddell, supra,* was decided, the death penalty has been imposed in such a small number of cases that its imposition is clearly selective and arbitrary; (4) the defendants sentenced to death since *State v. Waddell, supra,* was decided are predominantly non-white; (5) death is a cruel and unusual punishment because an "enlightened" public opinion has overwhelmingly repudiated it; (6) the punishment of death is both cruel and futile.

Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the seriousness with which they are advanced impels us to take note of each of them briefly.

(1) The Death Penalty Is Discretionary And Selective.

[20] As is true of any other criminal charge, a murder case or a rape case begins with someone notifying police officers that the offense has occurred. As the result of ensuing police investigation, the person charged is arrested and, in due time, the matter comes to the attention of the Solicitor. It is his duty to evaluate the information and determine whether to seek an indictment and, if so, for what offense. It is not the Solicitor's duty to seek the indictment or the conviction of the innocent, or to seek the conviction of a person, guilty of one crime, upon another and more serious charge of which he is not guilty. It is elementary and fundamental that a defendant is not be convicted unless his guilt is established beyond a reasonable doubt. The decision of the Solicitor as to the offense for which he will seek an indictment from the grand jury and his decision as to whether to accept, with the permission of the court, a plea to a lesser charge, included within the offense specified in the indictment returned, are the results of an evaluation of the available evidence, including its credibility. The Solicitor's decision to charge a defendant with a crime, punishable by death if he is convicted, is a solemn one, properly reached only when, in the Solicitor's judgment, the evidence of guilt is clear and convincing. This is a human evaluation. There is often room

for difference of opinion concerning it. To say, as does the brief of the amicus curiae, that because the Solicitor determines in many cases that he should seek a conviction of a lesser offense, his decisions to seek convictions on capital charges in other cases are "feakish" is a patent absurdity, unjust to the skilled and honorable attorneys who hold and have held the high office of Solicitor in this State.

The purpose of vesting the power of judgment in an official is to enable him to make different decisions in different cases in the light of what he determines to be materially different factual situations. All governmental actions are based on this delegation of responsibility. The Fourteenth Amendment to the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with "guidelines" that he becomes a mere automation, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike. From the foundation of the country to the present date, the discretion, now complained of by the amicus curiae, has been vested in prosecuting officers throughout the country. Without it, the greatest injustices would necessarily be inflicted upon innocent persons accused of crime.

The suggestion by the amicus curiae that the death penalty is unconstitutional because in many cases, in which the prosecuting attorney seeks the death penalty, the jury acquits the defendant altogether or convicts him of a lesser, included offense, has, if possible, even less plausibility. Article I, § 24, of the Constitution of North Carolina requires a trial by jury in all such cases. The Sixth Amendment to the Constitution of the United States contains a like provision. Obviously, the possibility of different verdicts by different juries in different cases upon different evidence was not believed by the framers of these constitutional provisions to be a sound reason for denying a state the power to impose an otherwise lawful penalty upon one found guilty by the jury which tried him, he having had a fair trial in accordance with the applicable law. *State v. Yoes* and *State v. Hale, supra,* at p. 631.

It is quite true that Article III, § 5(6), of the Constitution of North Carolina gives to the Governor of this State the authority to commute a death sentence imposed upon any defendant, or to grant to such defendant an absolute pardon, and to refuse to disturb such sentence imposed upon a different de-

fendant. Article II, § 2, of the Constitution of the United States confers a like power upon the President. So far as we have been able to determine, a like power is vested in the Governor, or some other official of the Executive Department, in each of our states. This power has existed and has been exercised repeatedly by the Governors of every state and by the President of the United States from the birth of our country. If its existence and frequent exercise makes the imposition of the death penalty unconstitutional per se, the nine Justices of the Supreme Court of the United States wasted a great deal of thought and much paper in *Furman v. Georgia, supra.* None of them so suggested in that case.

We reject categorically the contention of the amicus curiae that "the inevitable result of the North Carolina system of commutation is that an arbitrarily selected number of those convicted of like crimes will be put to death." The Governor exercises his judgment after investigatio.. of the record of the trial and other circumstances, including subsequently discovered evidence. This Court reviews the rulings of the trial judge. The Governor reviews the decision of the jury, which we may not do. The exercise by one Governor of this judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called "freakish" or "arbitrary" merely because another Governor might, theoretically, have reached opposite conclusions.

The Equal Protection Clause of the Fourteenth Amendment makes no distinction between sentences to death and sentences to imprisonment. The Due Process Clause of that amendment protects liberty as well as life. The discretion in the Solicitor, in the jury and in the Governor, of which the amicus curiae complains, extends also to con-capital cases. If the existence of these discretionary powers makes the imposition of the death penalty unconstitutional, it would also make unconstitutional all prison terms, however long or short. Quite obviously, this is not the kind of discretion which the Supreme Court of the United States held impermissible in *Furman v. Georgia, supra.*

(2) *The Number Of Death Sentences Imposed Since State v. Waddell, Supra, Shows That Decision Was Contrary To The Intent Of The Legislature.*

[21] This argument has no relation to the constitutionality of the death penalty. Our decision in *State v. Waddell, supra,* was announced 18 January 1973. It was well publicized. Bills were promptly introduced in the 1973 Session of the Legislature to counteract it and to abolish the death penalty. Obviously, this was within the authority of the Legislature. North Carolina Constitution, Article XI, § 2. Those bills failed to pass. This is a clearer indication of the intent of the Legislature than is a statistical comparison of death sentences imposed per year prior to *Furman v. Georgia, supra,* and subsequent to *State v. Waddell, supra.*

It is but natural that more death sentences per year will be imposed under a mandatory statute than under one giving the jury discretion as to the penalty. While the 1973 Session of the Legislature did not have before it statistics now available, it could hardly have supposed that the number of death sentences would not increase, at least until the fact that the death penalty is the lawful punishment in North Carolina for first degree murder, rape, first degree burglary and arson becomes known to those inclined to commit such offenses.

It is also perfectly obvious that it was the hope of the 1949 Session of the Legislature to reduce the number of death sentences imposed for murder and rape. Unfortunately, the statutory device which it adopted to effectuate such intent was held by the Supreme Court of the United States to be beyond the power of the Legislature. *Furman v. Georgia, supra.* By that determination, we are bound.

(3) *The Small Number Of Death Sentences Imposed Since State v. Waddell, Supra, Shows The Death Penalty Is Imposed Arbitrarily.*

[22] Having first contended that too many have been sentenced to death since *State v. Waddell, supra,* the amicus curiae here contends that the number is too small. *State v. Waddell, supra,* held the death penalty could be imposed under G.S. 14-17 (murder), G.S. 14-21 (rape), G.S. 14-52 (first degree burglary), or G.S. 14-58 (arson) only for offenses committed after 18 January 1973. There is, unavoidably, some time lag between the commission of an offense and the trial and sentencing of the offender.

As of 14 January 1974, virtually one complete year since our decision in *State v. Waddell, supra,* twenty-one persons,

including the present appellant, have been sentenced to death in North Carolina for crimes committed after the decision was announced, three being co-defendants charged with the rape of the same victim. The present appellant was the first person so to be sentenced and his is the first appeal from those so sentenced to reach this Court. It has, therefore, not yet been finally determined whether any or all of the remainder were tried and sentenced pursuant to law. Of all the twenty-one, thirteen were convicted of first degree murder only, one (the defendant) was convicted of first degree murder and of rape, five were convicted of rape only, one of first degree burglary only and one of first degree burglary and of rape.

We are not advised by the defendant or by the brief of the amicus curiae as to how many individuals were brought to trial in North Carolina during this twelve-month period on capital charges and no statistics on that matter are available to us. Consequently, we do not have before us the number acquitted or the number convicted of lesser, included offenses. If we had such statistical data, it would neither establish nor disprove the contention that the twenty-one sentenced to death were arbitrarily selected. Arbitrary discrimination cannot be shown from statistical data. It requires, at least, careful study of the records in cases where different results were reached in order to determine whether those differences in result were justified by differences in the facts. What we do know is that all defendants *convicted* of first degree murder or of rape, committed since 18 January 1973, have been sentenced to death. The contention of arbitrariness is, therefore, not established.

(4) *Those Sentenced To Death Since State v. Waddell, Supra, Are Predominantly Non-White.*

[23] The present record is completely silent as to the racial composition of the grand jury which indicted this defendant and the petit jury which found him guilty. We are quite certain that had there been no members of the defendant's race thereon, or had there been the slightest suggestion otherwise of racial discrimination in the selection of either the grand jury or the petit jury, the defendant and the amicus curiae would not have left us in ignorance thereof. We do know from our own repeated investigation and study of the matter in other cases in recent years that there is no substantial or widespread racial discrimination in the slection of grand or petit jurors in this State.

Consequently, we cannot predicate a conclusion that North Carolina juries are, or in recent years have been, more inclined to convict guilty Negroes than guilty white defendants, of crimes for which the death penalty is imposed, on nothing save an assertion to that effect by "enlightened" opponents of the death penalty and a statistical tabulation of convictions classified by race.

Five of the twenty-one individuals sentenced to death in the twelve months since *State v. Waddell, supra,* was announced are white, one is an Indian and fifteen are Negroes. Of the five white men, three were convicted of murder in the first degree, one of burglary in the first degree and of rape and one of rape only. Their appeals have not been heard. As above shown, we have nothing before us or available to us to show how many white defendants or how many Negro defendants, charged with the commission of a capital offense during this twelve-month period, were brought to trial and acquitted or convicted of a lesser, included offense.

Courts can deal only with individuals brought before them on charges of criminal acts. Neither the defendant nor the amicus curiae shows or even suggests that the police officers of North Carolina have discriminated between white and Negro individuals so charged in the matter of arrest or investigation. We know of no provision in the Constitution of the United States which require police officers, having arrested a Negro rapist or murderer, to arrest no more Negroes so charged until a quota of white murderers and rapists, proportionate to the racial distribution of the population, has been so charged and arrested. Nor are we aware of any provision in the Constitution which requires prosecuting attorneys to defer bringing defendants of one race to trial until members of the other race have been tried for such offenses in proportion to the respective racial population in the area. The experience of this twelve-month period demonstrates clearly that North Carolina juries can and will convict white defendants of capital crimes and North Carolina judges will sentence them to death upon such conviction.

The record of this Court establishes beyond question that such sentences have been, and will be, affirmed when the defendant has had a fair trial in accordance with law. In the seven years the writer of this opinion had been a member of this Court prior to *Furman v. Georgia, supra,* there were before it ap-

peals by twenty-six defendants sentenced to death. Sixteen were Negroes, nine were white and one was an Indian. One was a woman. Ten of the twenty-six were granted new trials by this Court, apart from any action of the Supreme Court of the United States. Of those ten, eight were Negroes and two were white. Thus, of the sixteen death sentences, affirmed by this Court in the seven years prior to *Furman v. Georgia, supra,* eight were imposed upon Negro defendants, seven upon white defendants and one upon an Indian. In those cases, each record was carefully reviewed by each member of this Court, over and beyond the reviews required by the formal assignments of error, just as has been done in the present case. In each of those cases, just as in the present case, the record revealed a cruel, brutal murder or rape, or both, with no extenuating circumstance. Nothing whatsoever in the record of any of those cases, or in the record of this case, offers the slightest justification for the statement, or the suspicion, that the juries of this State have been affected by the race of the defendant in their determination that those defendants, or the present defendant, should be executed. Nothing whatsoever in those records, or in the present record, justifies the suggestion, or a suspicion, that the death sentence in any of those cases, or in this one, was "freakishly" imposed or "freakishly" affirmed.

(5) *Death Is A Cruel And Unusual Punishment Because An "Enlightened" Public Opinion Has Overwhelmingly Repudiated It.*

[24] The brief of the amicus curiae does not define its term, "enlightened." The implication, reasonably drawn from it, is that an "enlightened" person is one who opposes the death penalty. Only on his hypothesis can the statement that "enlightened" public opinion has repudiated the death penalty be found true.

Since *Furman v. Georgia, supra,* was decided on 29 June 1972, according to the brief of the amicus curiae, twenty states, scattered over the entire country, have reinstated capital punishment by legislation. In addition to our own decision in *State v. Waddell, supra,* Delaware has retained the death penalty by judicial decision, holding its "Mercy Statute" severable from its earlier "Murder Statute." *State v. Dickerson, supra.* Thus, there are now twenty-two states which have made some provision, since Furman, to inflict the death penalty for one or more offenses.

According to the dissenting opinion of Mr. Justice Powell in *Furman v. Georgia, supra,* at p. 417, approximately six hundred individuals were in state and Federal prisons, throughout the country, under sentence of death at the time Furman was decided. Many others, including six in North Carolina (one under two death sentences) had had their death sentences reduced to life imprisonment just a short time earlier, by virtue of the decisions of the Supreme Court of the United States in *United States v. Jackson,* 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 2d 138, and *Pope v. United States,* 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed. 2d 1317. (See: *State v. Childs,* 280 N.C. 576, 187 S.E. 2d 78; *State v. Roseboro,* 279 N.C. 391, 183 S.E. 2d 108; *State v. Sanders,* 279 N.C. 389, 183 S.E. 2d 107; *State v. Williams,* 279 N.C. 388, 183 S.E. 2d 106; *State v. Atkinson,* 279 N.C. 386, 183 S.E. 2d 106; *State v. Atkinson,* 279 N.C. 385, 183 S.E. 2d 105; *State v. Hill,* 279 N.C. 371, 183 S.E. 2d 97.) As above noted, twenty-one have received sentences of death in this State since 18 January 1973.

The present record shows that fifty prospective jurors were examined by the State. Of these, five were challenged by the State for cause, due to their expressed unwillingness to return a verdict which would necessitate the imposition of the death penalty under any circumstances. Seven others were challenged peremptorily by the State. Assuming that all of these peremptory challenges were due to the Solicitor's misgivings concerning the views of the prospective jurors as to the death penalty, this record shows that only twenty-four per cent of those called for jury service in this case, in Union County, believed that in no case should the death penalty be imposed.

It is thus quite clear, both throughout North Carolina and throughout the nation, that there is widespread opinion that the death penalty is the appropriate punishment for certain crimes. We do not accept the pronouncement by the amicus curiae that this widespread opinion, held by legislators, judges and jurors, is "unenlightened."

(6) *The Punishment Of Death Is Both Cruel And Futile.*

The severity of the death penalty is obvious. For that reason, it has been, and should be, imposed only for the most serious crimes and only when the defendant's guilt of such an offense has been established beyond reasonable doubt.

[25] The amicus curiae contends that to inflict the death penalty for any crime is futile because such penalty is not the most effective means for obtaining the goals of criminal punishment which it says are: (1) Retribution, (2) moral reenforcement or reprobation, (3) isolation of the offender, (4) reformation and rehabilitation of the offender, and (5) deterrence.

Like Mr. Justice Stewart, in his opinion in *Furman v. Georgia, supra,* at p. 308, we "cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment." The reasonable certainty, or even likelihood of a punishment commensurate with the offense, imposed by the State, is more likely to deter private effort by the family and friends of the victim to "balance the account," than is a policy of correction designed to release the offender in society as soon as possible.

The amicus curiae acknowledges that "moral reenforcement or reprobation doubtless requires that the most serious crimes be punished most seriously." If so, the death penalty is not futile so far as the attainment of this goal is concerned.

"Isolation of the offender" apparently means prevention of further crime by him. The death penalty is certainly not futile in the attainment of this objective.

Reformation and rehabilitation of the offender is obviously cut off by his execution. The present defendant, however, is not a promising prospect for rehabilitation by human punishment of any sort. Before going to trial, he was committed to one of the State hospitals for the insane for the purpose of an examination into his sanity. He was returned for trial with the report, "Without Psychosis (Not Insane)." That evaluation of his mind is not challenged. It is not contended by the appellant or by the amicus curiae that this defendant is lacking in intelligence. Prior to the offenses with which we are now concerned, the defendant was convicted of the murders of two other persons by stabbing them. For these offenses he was imprisoned for a term of years. While serving that sentence, he was permitted to join a national civic society, the Junior Chamber of Commerce, and became the president of a chapter of this society organized within the prison. He was permitted to leave the prison so as to attend a State convention of this organization. He took advantage of this leniency and escaped. Two days later, within a space of less than three hours, he abducted and raped a girl of his own race,

whom he had never seen before, and stabbed to death a complete stranger, a teenager sitting quietly in a parked car, for the sole purpose of stealing the automobile. He callously drove off with the dying boy and abandoned his body in a roadside ditch. When arrested four days thereafter by agents of the Federal Bureau of Investigation, he was carrying, concealed, on his person, another deadly knife, and his only expression of regret was that he had not had an opportunity to kill the arresting officer. The evidence is not convincing that another term in prison would be more efficacious in rehabilitating this defendant.

Whether the imposition of the death penalty in such a case will be futile in deterring others from like acts is, necessarily, a matter of opinion, upon which reasonable minds may and do differ. The steadily rising tide of crimes of the most serious nature, throughout the nation, has occurred in an era of unprecedented permissiveness in our society and of emphasis on sympathy for the accused rather than for his victim and those endangered by him. This is ample basis for reasonable men to conclude that some punishment of exceptionally vicious crimes, other than imprisonment coupled with carefully organized programs for rehabilitation designed to assure the prisoner that he has the sympathy of society, is necessary to bring about the turning of the tide.

Through recent years, the efforts of North Carolina actually to impose capital punishment in the most flagrant instances of vicious crime have been blocked by mandates of the Supreme Court of the United States stemming from *Furman v. Georgia, supra, United States v. Jackson, supra, and Pope v. United States, supra.* We, therefore, do not have recent experience which would support or disprove the contention of the amicus curiae that the carrying out of the death sentence in this instance would be less effective than imprisonment as a means of deterring others from like acts.

It is not, however, the function of this Court to determine the most efficacious punishment for the crimes of murder in the first degree and of rape. That is the function of the Legislature. Nothing in the Constitution of the United States requires that the Legislature prescribe the most efficacious punishment for crime, or even the one favored by "enlightened" sociologists. It is sufficient that reasonable men can believe that the punishment prescribed is reasonably adapted to the attainment of the

goals of all criminal punishment. In our opinion, G.S. 14-17 and G.S. 14-21, as construed by us in *State v. Waddell, supra,* meet this constitutional standard.

We, therefore, reject the contentions of the defendant and of the amicus curiae that the imposition of the death penalty for the crimes of first degree murder and rape is, per se, a violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

No error.

Chief Justice BOBBITT, with whom Justices HIGGINS and SHARP join, dissenting as to death sentences.

State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19, was decided 18 January 1973. *All* members of this Court agreed, as stated in the majority opinion, that "the *Furman* decision [*Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726, decided 29 June 1972] holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion." 282 N.C. at 439, 194 S.E. 2d at 25. Waddell's death sentence was *vacated* and his case remanded to the superior court for a judgment of life imprisonment.

All of us agreed that *Furman* required this disposition of Waddell's case. However, the majority opinion stated that for crimes of first degree murder, rape, first degree burglary, and arson, committed after 18 January 1973, the date of the *Waddell* decision, punishment by death would be mandatory. In accord with that statement, the majority sustain the death sentences herein. Three of us dissented in *Waddell* and now dissent from that view of the law. We were and are of the opinion that the impact of *Furman* upon our statutes is *to prohibit*—not to require or permit—*the imposition of death sentences until such time as our statutes are amended by the General Assembly.*

The statutes enacted by our General Assembly provide that a person convicted of first degree murder, G.S. 14-17, or of rape, G.S. 14-21, or of first degree burglary, G.S. 14-52, or of arson, G.S. 14-58, shall suffer death *unless* the jury, at the time of rendering its verdict in open court, recommends that the defendant's punishment shall be imprisonment for life in the State's prison. These statutes were rewritten as now codified by Chapter 299,

Session Laws of 1949. The 1949 Act provided: "This Act shall be in full force and effect from and after its ratification, *not excepting trials for offenses committed prior to its ratification.*" (Italics added.) The application of the 1949 Act to offenses committed prior to its ratification is further indication of the General Assembly's intent that punishment by death was not to be imposed unless the jury was given the discretion to recommend that punishment be life imprisonment and failed to make such recommendation. No changes have been made *by the General Assembly* in any of the provisions of G.S. 14-17, G.S. 14-21, G.S. 14-52, and G.S. 14-58, since the 1949 Act.

The majority (4) were of the opinion that the impact of *Furman* was to invalidate the proviso in each of these statutes; and that, upon invalidation of the proviso, the remaining portion provided unconditionally for punishment by death. The minority (3) were of the opinion that the impact of *Furman* was to invalidate *the death penalty provision* of these statutes; and that, unless and until the statutes were amended *by the General Assembly,* the punishment for each of these crimes is life imprisonment.

In *Waddell,* I expressed by dissenting views in these words: "I do not think *any death sentence* may be constitutionally inflicted unless *our General Assembly* strikes from our present statutes the provisions which leave to the unbridled discretion of a jury whether the punishment shall be death or life imprisonment. In my opinion, this Court has no right to ignore, delete or repeal these provisions, which were put there by the General Assembly as an integral part of its plan for the punishment of crimes for which the death sentence was permissible. *Furman* did not repeal them. This Court has no right to repeal them." *State v. Waddell, supra,* at 453-54, 194 S.E. 2d at 31.

In *Waddell,* I reviewed court decisions of Ohio, Mississippi, Louisiana, Oklahoma, Illinois, Pennsylvania, Arkansas, Washington, Virginia, Florida and Texas, relating to the impact of *Furman* upon statutes of those states containing essentially the same provisions as our G.S. 14-17, G.S. 14-21, G.S. 14-52 and G.S. 14-58. Each interpreted *Furman* as holding that no death sentence could be imposed as long as the statute(s) of that state contained provisions which left to the unbridled discretion of a judge or jury whether the punishment would be death or life imprisonment. Later, decisions to the same effect were handed down in Alabama [274 So. 2d 298 (1973)]; Arizona

[506 P. 2d 248 (1973)]; Kansas [513 P. 2d 248 (1973)]; Maryland [297 A. 2d 696 (1972)]; Massachusetts [300 N.E. 2d 439 (1973)]; New York [300 N.E. 2d 139 (1973)]; South Carolina [192 S.E. 2d 720 (1972)]; Tennessee [496 S.W. 2d 900 (1972)].

The majority opinions in *Waddell* and in the present case cite *State v. Dickerson, Del. Supr.*, 298 A. 2d 761, the only decision which supports to any extent the views of the majority. I now add to the dicussion of *Dickerson* in my dissenting opinion in *Waddell* the following: Further research discloses a comprehensive revision of Title II, Parts 1 and 2, of the Delaware Code, was approved by the General Assembly of Delaware on 6 July 1972 and became effective 1 April 1973. 58 Delaware Laws, Chapter 497. The portion of this revision codified as Section 4209 sets forth in detail a new procedure for determining whether the punishment is to be death or life imprisonment upon a plea or conviction of guilty of murder in the first degree committed on or after 1 April 1973. *Dickerson* was decided 1 November 1972. The statutes to which it relates became obsolete on 1 April 1973. *Dickerson* held that first degree murders committed in Delaware during the five (5) months between 1 November 1972 and 1 April 1973 were punishable by death. My research indicates there has been no decision of the Supreme Court of Delaware since *Furman* which sustains a death sentence. Apparently, the four-to-three decision in this case is the only decision since *Furman* which sustains a death sentence under statutory provisions similar to ours.

The majority opinion in the present case states: "All of the members of this Court agreed that, notwithstanding Furman, these statutes remain in the law of North Carolina, in part, and only in part. The difference of opinion among the members of this Court was as to which part of each such statute remained the law of this State, the original provision making death the mandatory punishment, or the proviso, added by the 1949 amendment, which attempted to confer upon the jury the discretion forbidden by Furman." These sentences do not accurately state the views of the minority. In our view, the provisions of these statutes embody an indivisible and unified plan for punishment of the felonies referred to therein. *Furman* did not purport to delete, isolate or invalidate any particular portion of the statute. *Furman* simply held that the death penalty provision under the statutes as now constituted

is invalid and that, absent amendment, no death sentence can be constitutionally imposed and carried out.

On authority of *Furman*, the Supreme Court of the United States vacated the death sentences which this Court had sustained in the *Miller, Hamby and Chandler, Chance, Westbrook* and *Doss* cases; and, pursuant to the mandate of the Supreme Court of the United States, this Court remanded these cases for judgments imposing sentences of life imprisonment. For citations, *see State v. Waddell, supra*, at 453, 194 S.E. 2d at 30-31. *Furman* did not reinstate death as the only permissible punishment for murder in the first degree, rape, burglarly in the first degree, and arson.

The majority opinion responds to the portions of the briefs of defendant and of the amicus curiae which urge this Court to what the Supreme Court of the United States refused to do in *Furman*, that is, to hold that punishment by death constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Being of the opinion that, for the reasons stated herein, the death sentences must be vacated and the cases remanded for judgments of life imprisonment, I refrain from discussing these matters otherwise than by repeating this statement from my dissenting opinion in *Waddell, viz:* "I agree that the *Furman* decision has not established the proposition that capital punishment under all circumstances constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Moreover, nothing in the *Furman* decision would seem to invalidate a statute of our General Assembly prescribing death as the sole and exclusive punishment for murder in the first degree, rape, burglary in the first degree, or arson. Whether such a statute should be enacted is for legislative determination." 282 N.C. at 473, 194 S.E. 2d at 43.

Since the provisions of G.S. 14-17 (murder in the first degree) and G.S. 14-21 (rape) are now the same as when *Furman* was decided, I think the only permissible course is *to vacate each of the death sentences* and *to remand the cases for the pronouncement of judgments of life imprisonment.*

Justice SHARP, concurring further in the dissenting opinion of Chief Justice Bobbitt.

To Chief Justice Bobbitt's succinct interpretation of the effect of the *Furman* decision upon our statutes which have specified the punishment for first-degree murder, rape, first-degree burglary, and arson, I can add nothing. He has expressed my views exactly. However, I make the following comments:

In my view the death sentence is not constitutionally impermissible as cruel and unusual punishment for first-degree murder and rape. The question of capital punishment, however, is one of momentous public policy to be determined by the legislature. It is not for this Court to declare either by unanimous decision or four-three division.

In 1949 the legislature, in effect, made the punishment for first-degree murder, rape, first-degree burglary, and arson death or life imprisonment as the jury, in its discretion, might determine. In 1972 the *Furman* decision wrecked that plan by outlawing the imposition of the death penalty under any statute which permitted either judge or jury to impose it as a matter of discretion. On 18 January 1973 this Court, in the four-three *Waddell* decision, completed the destruction of the legislative plan by making the death sentence mandatory for the four crimes when committed after that date. Since these two decisions the legislature has not rewritten the affected statutes. Surely it is time for the General Assembly to exercise its constitutional, legislative prerogative. N. C. Const. art. I, § 6 declares, "The legislative, executive, and supreme judicial power of the State government shall be forever separate and distinct from each other."

STATE OF NORTH CAROLINA v. TOMMY NOELL

No. 10

(Filed 25 February 1974)

1. **Jury §§ 5, 7— jurors acquainted with defendant — challenge for cause — excusal proper**

The trial court did not err in excusing for cause three prospective jurors who stated unequivocally that because of their acquaintance and friendship with defendant and his family they could not find defendant guilty even though the State had convinced them beyond a reasonable doubt of his guilt.

APPENDIX C

Excerpt from
5 ENCYCLOPAEDIA BRITANNICA.
Death

SET FORTH IN THIS APPENDIX ARE PERTINENT EXCERPTS FROM 5 ENCYCLOPEDIA BRITANICA, DEATH, 526-529 (1974 Edition).

* * *

DEATH

Death,. . . has always been viewed with mystery, superstition, and fascination by man. . . What it is,. . . can only be conjectured. It is the supreme puzzle of poets, the concern only of humankind, and the inevitable fate of all things living. . .

THE CONCEPT OF DEATH

Man knows that things die. He witnesses their deaths and sometimes even executes them. These traumatic deaths are easy to understand. A complex living system is quickly and radically destroyed, and it ceases functioning. Natural death,. . . is much more difficult to grasp.

Perhaps when man first discovered that certain slumbers were irreversible, he questioned the difference between that profound sleep and the daily slumbers he experienced. Manifest in ritual, symbol, and philosophical perspective are countless efforts throughout history to rationalize this final reality, the philosophical "why" of which still defies explanation, but the biomedical "how" of which is yielding to investigation.

BIOLOGICAL DEATH. In the economy of nature one generation succeeds another, living its span, then yielding to the

next. Those organisms survive that are best adapted to the prevailing environmental conditions. When those conditions change, the organisms least adapted may no longer be capable of surviving and may migrate to more favourable surroundings or may die. . .

DEATH OF THE ENTIRE ORGANISM. From the earliest days it was known that death of all parts of a multicellular organism did not occur simultaneously. Since the heart was considered to be the central organ, its cessation of function was used to mark the beginning of death for other vital organs. Historically, clinical death has been based on the absence of the heartbeat (and therefore the peripheral pulse) and the absence of breathing (with resultant bluing of the extremities, mouth, and lips). A lack of certain reflexes of the eye is also noted when death is further advanced, with absolute signs, such as algor, rigor, and livor mortis, finally becoming apparent. Algor mortis represents the fall of body temperature to that of the environment. Rogor mortis is the rigidity of skeletal muscles. Finally, livor mortis is the purple-red discoloration of parts of the body as a result of the settling of blood.

. . .

THE PROSPECT OF DYING

The awareness of death is difficult to study objectively. The reality of death for the individual is not dwelt upon but is usually --and thankfully-- of momentary concern. Although each person may be

reminded of death frequently enough, the personal reality of it is often remote. Studies on patients with terminal illnesses who face death imminently have revealed much of interest and psychosocial value regarding the personal response to the approach of death.

THE STAGES OF DYING. Terminally ill patients often go through a series of five stages in accepting the reality of their own finiteness and oncoming death. Most patients initially respond with temporary shock and a mental denial to the first awareness of a fatal, or potentially fatal, illness. Informed about the diagnosis, a patient may not be able to "hear" it and may go from hospital to hospital in an attempt to find someone who will reassure him that his condition is not serious. Eventually, he will face the reality, but often only for brief periods of time, to provide a last will and perhaps make arrangements for dependents.

Sooner or later, however, he will drop his denial and enter the second stage, the stage of anger, during which he complains about any service anyone renders and is difficult to deal with; thus he is often avoided, which only increases his rage. This is the stage at which he no longer says, "no, not me" but instead "why me?" His anger is displaced to the nurse, the physician, the family members, in fact to all the people around him who represent life, energy, and functioning--the very qualities the patient is in the process of losing. The anger also includes God, who "is not listening" to the patient's please for help and good health. Patients who are not made to feel guilty or ungrateful

during this difficult time--who are encouraged to express their anger--will soon proceed to the third stage, the stage of bargaining.

. . .With the realization that he is to die soon, the patient offers a token in exchange for prolongation of life, usually in form of prayers: "if you give me one more year of life, I will become a good Christian," or "I will go to the Synagogue every day," or "I will make a pilgrimage . . ." This is the time of truce, psychologically speaking. The patient is not at peace, though he is more comfortable emotionally and believes that he has a certain extension of life, no matter how brief. He will say "yes, it is me, but. . .," and only when the bargaining time is up will he enter the fourth stage, one of depression. He now faces that certainty that it is truly his life that is coming to an end. He has responded already to the losses he has experienced (an organ perhaps, a job, being home with the family) and gradually descends into deep and silent depression called the preparatory grief. This is the time when he faces the impending loss of everybody and everything he has ever loved. He begins to separate from the living and finally wants only the next of kin by his side. When he has finished all his business, has ventilated his anger and expressed his grief, he will be able to reach the final stage, of acceptance.

A patient who has no moral support and help during this crucial period of his life or who is isolated in a hospital or nursing home will often remain merely resigned to death. He is bitter, unhappy,

and often complains, frequently to the very end of life. By contrast a patient in a true stage of acceptance is almost void of feelings; he may say simply: "My time comes very close and it is all right." If no extraordinary means are employed to prolong his life at this time, the patient is prepared to die with peace and dignity.

Three basic requirements are necessary to assist chronically ill patients to reach this final stage of equanimity: (1) excellent nursing care with adequate pain relief, (2) a flexible management in order to gratify simple needs (lifting severe restrictions against food, drink, and cigarettes), and (3) a hospital staff and a family who themselves accept the reality that this patient is dying and who can openly talk about it, if and when the patient expresses a desire to talk about it.

The patient's hope, originally associated with cure, treatment, or prolongation of life, is then diverted to hope for God's acceptance, for maintaining a sound mind to the end or simply for the well-being of the children or family left behind.

A patient with a genuine faith (of whatever religion, including those that do not believe in an afterlife) dies with less turmoil than one who lacks belief. A person raised in a rural environment or in a non-death-denying society faces death with more equanimity that a person who grew up in an urban environment, where death occurs in hospitals, where children

are "protected" from sharing this experience in a community, and where mortuaries attempt to disguise the reality of death with heavy makeup and other forms of denial.

Family members and attending staff also proceed through these five stages, when personally involved in the care of a dying patient. Parents of dying children and anyone who loses a loved one suddenly and unexpectedly may go through this adjustment after the death occurs--often in a prolonged manner and requiring more time to reach a true stage of acceptance. Widows and widowers often die soon after the death of the spouse, during their own grief process, which apparently renders them more vulnerable to death, often without reaching the stage of acceptance.

A patient is often able to convey his awareness of impending death and will communicate this knowledge to those around him if they are listening. He may comment simply: "My time is very close now and I am ready." He may use symbolic language: "I had this fantasy of a train running rapidly down the hill toward the end of the tracks and I had an argument with the trainmaster. I demanded that he stop the train 1/10th of an inch short of the end." This patient's request for a tenth of an inch represented his bargaining for a very short extension of time to complete some unfinished business. When he accomplished his goal, he died very peacefully a few days later. It is not known exactly how patients realize the moment of impending death, but it is a fact that many of them are able to postpone death psychologically

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or to hasten it (without committing suicide) when they no longer desire to struggle for life.

THE FEAR OF DEATH. The fear of death is universal and consists of two parts. Consciously, people may be afraid of the pain and suffering associated with dying, the separation from the living, or simply the state of non-being or nothingness. Fear of the unknown is frequently mentioned as the most outstanding fear. Much more significant, however, is a fear heavily repressed and often revealed through dream material or, in the case of children through play or in drawings. The often-repressed fear of death is seen as a fear of castastrophic destructive force bearing down and leaving the victim with a sense of utter helplessness, impotence, and rage. It is the fear of a traumatic annihilation that can be seen in children even before they have an empirical knowledge of death. Perhaps this fear originates in attitudes formed during the infantile stage that precede those attitudes imposed by culture or religion. Whether anxiety of death is an inherent property or not, it seems clear from clinical evidence that the early mother-child relationship is an essential source of the death complex in its catastrophic aspects. . . .

APPENDIX D

List of Cases
Acted upon by the
North Carolina Supreme Court
applying *Furman* principles

APPENDIX D

State v. Blackmon, 280 N.C. 42, 185 S.E. 2d 123 (1971), *aff'd.* 284 N.C. 1, 199 S.E. 2d 431 (1973)

State v. Carroll and Stewart, 282 N.C. 326, 193 S.E. 2d 85 (1972)

State v. Chance, 279 N.C. 643, 185 S.E. 2d 277, *vacated and remanded sub nom. Chance v. North Carolina*, (1972) 408 U.S. 940, 92 S.Ct. 2878, 33 L.Ed. 2d 764 (1972), *rem.* 281 N.C. 746, 191 S.E. 2d 65 (1972), *aff'd.* 283 N.C. 102, 194 S.E. 2d 858 (1973)

State v. Cummings, 284 N.C. 420, 200 S.E. 2d 591 (1974)

State v. Doss, 279 N.C. 413, 183 S.E. 2d 671 (1972), *vacated sub nom. Doss v. North Carolina*, 408 U.S. 939, 92 S.Ct. 2875, 33 L.Ed. 2d 762 (1972), *rem.* 281 N.C. 751, 191 S.E. 2d 70 (1972)

State v. Edwards, 282 N.C. 201, 192 S.E. 2d 304 (1972)

State v. Frazier, 280 N.C. 181, 185 S.E. 2d 652 (1971), *vacated sub nom. Frazier v. North Carolina*, 409 U.S. 1004, 93 S.Ct. 453, 34 L.Ed. 2d 295 (1972), *rem.* 283 N.C. 99, 195 S.E. 2d 33 (1972), *aff'd.* 284 N.C. 120, 199 S.E. 2d 431 (1973)

State v. Hamby and *State v. Chandler*, 276 N.C. 674, 174 S.E. 2d 385 (1970) *rev'd. sub nom. Hamby* and *Chandler v. North Carolina*, 408 U.S. 937, 92 S.Ct. 2862, 33 L.Ed. 2d 754 (1972), *rem.* 281 N.C. 743, 191 S.E. 2d 66 (1972)

State v. Miller, 276 N.C. 681, 174 S.E. 2d 481, *rev'd. sub nom. Miller v. North Carolina*, 408 U.S. 937, 92 S.Ct. 2863, 33 L.Ed. 2d 755 (1972), *rem.* 281 N.C. 740, 190 S.E. 2d 841 (1972)

State v. Talbert, 282 N.C. 718, 194 S.E. 2d 22 (1973)

State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973)

State v. Washington, 283 N.C. 175, 195 S.E. 2d 534 (1973), *cert. den.* 414 U.S. 1132, 93 S.Ct. 537, 38 L.Ed. 2d 757 (1974)

State v. Watkins, 283 N.C. 504, 196 S.E. 2d 750 (1973)

State v. Westbrook, 279 N.C. 18, 181 S.E. 2d 572 (1971), *vacated sub nom. Westbrook v. North Carolina*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.E. 2d 761 (1972), *rem.* 281 N.C. 748, 191 S.E. 2d 68 (1972)

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Supreme Court, U. S.
FILED
APR 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Because the opening briefs of the parties and amici have been lengthy, we confine this reply brief to short compass.[2] As respondent notes (N. C. Br. 8-9),[3]

1/ The briefs will hereinafter be cited as follows:

Brief for Petitioner is cited as Pet. Br. __.
Brief for Respondent North Carolina is cited as N.C. Br. ___.
Brief for California as Amicus Curiae is cited as Cal. Br. __.
Brief for Utah as Amicus Curiae is cited as Ut. Br.__.
Brief for the United States as Amicus Curiae is cited as U.S. Br. ___.

2/ Even in a case whose subject matter was less important than life and death, we would think it ill-fitting to rise to points of personal privilege in connection with the implications of the portions of N.C. Br. 18-22 titled "correction of erroneous statements in Petitioners [sic] Brief." We know that the Court will have carefully read both the "erroneous statements" and the "correction[s]" of them, and we rest secure in the Court's judgment as to where the errors lie.

3/ See also U.S. Br. 2.

our Eighth Amendment argument in this Court has two aspects.[4] We consider separately the responses made to each.

First, however, we acknowledge a point that is common to both aspects of our argument and is quite properly the mainstay of all the responding briefs. (See N.C. Br. 24-30, 39-40, 42-46, 49; Cal. Br. 9-13, 22-23; Ut. Br. 16; U.S. Br. 5-6, 8-11, 23-24, 29-32, 46-55, 77.) This is the point that a large measure of deference is due by the Judiciary to legislative choice and to the autonomy of the States in fixing punishments for crime. No one disputes it. Certainly we do not. The question of the proper scope of judicial deference was a critical issue in Furman, and it is a critical issue here.

4/ North Carolina's "Query" (N.C. Br. 8, n.4) as to whether the Petition for Certiorari properly raises that aspect of our argument which is based upon Furman v. Georgia, 408 U.S. 238 (1972), is an insubstantial query. The Question Presented in the Petition for Certiorari is: "Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendment to the Constitution of the United States?" Petition for Writ of Certiorari to the Supreme Court of North Carolina, Fowler v. North Carolina, No. 73-7031 (filed July 9, 1974) at 2. It was modeled on the question framed in Furman: "'Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?'" 408 U.S. at 239, except that it makes explicit reference to the "law of North Carolina" upon which we rely in the Furman aspect of our argument. See Pet. Br. 45-101. The Supreme Court of North Carolina experienced no difficulty in identifying the two-phased nature of our Eighth Amendment contention; it rejected both phases together after describing them as follows: "Defendant . . . contends that the death penalty in this case is cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments [and by] . . . the Constitution of North Carolina. He further contends that capital punishment in North Carolina is still imposed in a selective and arbitrary manner, in violation of Furman v. Georgia . . . ." (A. 103). See also Grouping of Exceptions and Assignments of Error in the North Carolina Supreme Court, A. 88.

But the necessity for deference creates -- it does not resolve away -- the "ordeal of judgment"[5] that lies at the heart of the institution of judicial review under the Constitution. Time and again this Court is required to make excruciatingly difficult constitutional decisions "bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication."[6] "Inevitably, then, there will be occasions when [the Court] . . . will differ with Congress or state legislatures with respect to the validity of punishment."[7] To talk about judicial deference as though it were an answer -- indeed, the only legitimate answer -- on each of these occasions both oversimplifies the judicial role and disregards its inherent difficulty.

We have tried not to understate that difficulty. See Pet. Br. 103-106. The legislative determinations of "at least 31 states and the United States since Furman"[8] (U.S. Br. 77)

5/ Trop v. Dulles, 356 U.S. 86, 104 (1958)(plurality opinion of Chief Justice Warren).

6/ Ibid.

7/ Furman v. Georgia, supra, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

8/ Since the filing of petitioner's opening brief, the State of Virginia has enacted a death penalty statute which applies to three kinds of murder. This statute is summarized in Appendix A, infra.

are assuredly entitled to respect in the process of decision of this case, although we agree with the Government that "[i]t also [is] . . . helpful to determine the reason why society [has] . . . not rid itself of the apparently aberrant punishment without the need for judicial intervention" (U.S. Br. 8). The latter inquiry is undertaken at Pet. Br. 131-140.[9] We have not suggested that the question of the appropriate scope of judicial review here can be resolved simply by pointing to Article III of the Constitution, any more than by pointing to its Preamble (N.C. Br. 25-27) or to the "proposition that the federal government is one of limited powers" (N. C. Br. 44). If, in the exercise of one of those limited powers -- the power of the federal Judiciary to test the federal constitutionality of a State's judgment to take the life of a citizen -- this Court concludes that "the legislative judgment on these matters should

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9/ Those pages are concerned with the difference between the function of a legislature to respond politically to indicators of public conscience and the function of the courts to rationally interpret indicators of public conscience. See Appendix B, infra, at 8b-13b. They thus respond to the question posed by the Government (U.S. Br. 31) whether invalidation of the death penalty would not require this Court to conclude that the legislatures of thirty-one States and Congress were unresponsive to the standards of decency of their electorates.

be accepted by the judicial arm" (U.S. Br. 11),[10] we do not pretend that that decision will entirely prostrate Article III. Nor will a contrary decision by the Court -- disagreeing with legislative judgment as to the constitutional permissibility of a particular form of punishment -- entirely prostrate the power of the States to "insure domestic tranquility" under the Preamble (N. C. Br. 25),[11] or substitute "an anomalous referendum among judges as a proxy for the 'true' will of the electorate" (U.S. Br. 47). Questions of the scope of judicial review are always matters of degree, not poster-color slogans. That is why we have tried, at Pet. Br. 106-121, to articulate the specific considerations which support the specific standard of review of the death penalty that we have asked the Court to make under the Eighth Amendment.

10/ The full sentence in the Government's brief (U.S. Br. 10-11) is: "Although there may be legitimate differences of opinion regarding capital punishment's acceptance by modern society, its value as a deterrent, and society's need for it to reinforce social values and incapacitate dangerous offenders, those differences of opinion are to be resolved by the legislature; and the legislative judgment on these matters should be accepted by the judicial arm." Of course this is true insofar as opinions on the three questions stated by the Government are relevant to the question of the wisdom of capital punishment, but it is not true insofar as opinions on the same three questions enter into the judgment of constitutionality. Legislative judgment on matters of policy is indisputably conclusive; legislative judgment on constitutional issues, while entitled to respect, cannot conceivably be "accepted" as conclusive by the judiciary; and formulations which confuse the two judgments simply because both involve attention to some of the same ingredients do little to enlighten the process of constitutional decision-making.

11/ Cf. the Government's quotation from Goodhart (U.S. Br. 42): "'A community which is too ready to forgive the wrongdoer may end by condoning crime.'" Presumably the form of condonation implied here is a conviction of murder followed by a sentence of life imprisonment. The equation of a restriction upon the power to punish capitally with a restriction upon the power to protect society by the choice of effective punishments begs a major question in this case.

Among matters of degree, however, there are larger and smaller differences. Two large differences are central to this case. First, death as a punishment is different than any lesser punishment (see Pet. Br. 107-120; BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 29-36 (1974)); and arguments that treat the killing of a human being as fungible with other state experiments in the science of penology (see, e.g., U.S. Br. 43), or suggest that Eighth Amendment restraints upon the one are "equally" applicable to the others (U.S. Br. 57), defy reality as much as they ignore authority. See Furman v. Georgia, supra. Second, while the scope of Eighth Amendment review that we urge here -- turning as it does upon the unique character of the penalty of death -- leaves legislatures virtually unimpeded in the fashioning of punishments for crime as they see fit, the scope of review urged by the respondent and its supporting amici leaves the Eighth Amendment virtually unenforceable.[12/] The Government candidly admits as

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12/ E.g., U.S. Br. 8-9: "When a penalty is enacted by a legislature and imposed only by a unanimous jury, the sanction is very unlikely to be outside the bounds of social tolerance. . . . Were this Court to hold the death penalty unconstitutional, it would have to conclude that it -- whose justices are not elected and have been given life tenure in order to insulate them from popular and political opinion -- is more conscious of and more responsive to the will of the people than are the representatives directly elected by and responsible to those people . . . . But if the people are to give their verdict of what is cruel and unusual, the people -- through their elected representatives and through juries -- must sit in judgment." See also U.S. Br. 29: "Thus, if a penalty can pass the dual tests of enactment by the people's representatives and application by the people themselves sitting as a jury, it is almost certainly not so cruel, disproportionate, or repulsive to the sensibilities of modern society that it is forbidden by the cruel and unusual punishments clause."

much when it opines that "desuetude . . . was probably the proper 'fate' of the amendment in light of its history" (U.S. Br. 23-24).[13/] It is not obvious how the Government squares this requiem for the Eighth Amendment with Robinson v. California, 370 U.S. 660 (1962),[14/] let alone with Furman. In a companion case to Furman, the petitioner's brief suggested that judicial review of certain forms of legislation under the Cruel and Unusual Punishments Clause is neither an atavistic nor a dispensable safeguard in the American structure of democratic, majoritarian government. We append that discussion,[15/] which is fully applicable to post-Furman death penalty legislation for the reasons set forth at Pet. Br. 131-133.

13/ Desuetude would certainly be the fate of the Amendment if this Court's prior Eighth Amendment decisions were limited according to the Government's explanation of them (with the notable omission of Furman) at U.S. Br. 24-27 -- each decision painted into an isolated and disjointed corner, so that no coherent or intelligible principles of Eighth Amendment jurisprudence survive.

14/ The Government's discussion of Robinson (U.S. Br. 26-27) fails to explain why, under its theory of the Eighth Amendment, a legislative judgment to treat particular conduct as criminal is entitled to less judicial deference than a legislative judgment regarding the particular punishment to be imposed for criminal conduct.

15/ Pages 13-27 of the Brief for Petitioner in Aikens v. California, 406 U.S. 813 (1972) [No. 68-5027], are attached as Appendix B, infra.

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1. The Perpetuation of Arbitrary Selectivity Under North Carolina's "Mandatory" Capital Punishment Procedures.

Respondent does not controvert our description of North Carolina practice in "capital" cases (Pet. Br. 45-100)[16] and of the numerous uncontrolled selective processes that cumulatively choose some men to actually die from among the larger number who are capitally punishable under North Carolina's broad range of capital offenses.[17] (N.C. Br. 13, 33-39). Rather, these processes are defended on the ground that each choice is made "in good faith, upon oath, according to the law and evidence" (N.C. Br. 37). We question no one's good faith. But good faith is obviously not sufficient to avoid irregularity and

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16/ Respondent does emphasize (N.C. Br. 36-37), as we have previously noted (Pet. Br. 63 and id. n.97, 77-78 and id. n.118) that North Carclina trial judges are not required to submit evidentially unsupported lessers to a jury, and have been admonished by the North Carolina Supreme Court not to do so. Respondent fails to note that trial judges nevertheless do do so in some cases, and that the North Carolina Supreme Court has uniformly held that there is no remedy for, or sanction against, the practice. See Pet. Br. 77-79.

17/ See Pet. Br. 18-23. At Pet. Br. 23 n.25, we noted the enactment of a new North Carolina death penalty statute on April 8, 1974. However, the North Carolina Supreme Court has since held that the 1974 statute is nowise retrospective and has no effect upon death penalties imposed under Waddell prior to its enactment. State v. Williams, 286 N.C. 422, __ S.E.2d __ (1975). Accord: State v. Avery, 286 N.C. 459, __S.E.2d __ (1975); State v. Lampkins, 286 N.C. 497, __S.E.2d __ (1975).

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arbitrariness when innumerable separate prosecutors, judges, jurors and Governors make innumerable life-or-death decisions the least discretionary of which are defined by vague formulations such as "malice," and "premeditation."[18] The behavior of juries alone -- the most visible and legally constrained decision-makers in the entire process -- plainly exhibits choices to convict alternatively of first degree murder, second degree murder or manslaughter that are inexplicable except as exercises of discretion (see Pet. Br. App. C), no "different in kind [or in] . . . degree, from the discretion"[19] condemned in Furman (N.C. Br. 38)(emphasis in original).

18/ Cf. Baggett v. Bullitt, 377 U.S. 360, 373 (1964):"[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law."

19/ Moreover, recent criminal procedure amendments, effective July 1, 1975, have endorsed the rule of State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974)(described at Pet. Br. 89-94) and insure that the jury will continue to be able to nullify the death penalty in a sympathetic case, since North Carolina now has provided a statutory right of a capital defendant to have his jury instructed as to the consequences of a guilty verdict:

> [N.C.Gen. Stat. §15-176.3 (cum. supp.):]
> "Informing and questioning potential jurors on consequences of guilty verdict.- When a jury is being selected for a case in which the defendant is indicted for a crime for which the penalty is a sentence of death, the court, the defense, or the State may inform any person called to serve as a potential juror that the death penalty will be imposed upon the return of a verdict of guilty of that crime and may inquire of any person called to serve as a potential juror whether that person understands the consequences of a verdict of guilty of that crime."
>
> [N.C. Gen. Stat. §15-176.4 (cum. supp.):]
> "Instruction to jury on consequences of guilty verdict. -When a defendant is indicted for a crime for which the penalty is a sentence of death, the court, upon request by either party, shall instruct the jury that

Taking a somewhat different tack, the Government's brief concedes that an array of broadly discretionary judgments does determine which particular defendants will be sent to death under a purportedly "mandatory" death penalty scheme. (U.S. Br. 55-77.) Indeed, the Government's argument that public acceptance of the death penalty is demonstrated by juries' willingness to "assess guilt with knowledge of the potential penalties" (U.S. Br. 30) explicitly recognizes that capital jurors make discretionary sentencing judgments in deciding whether or not to convict of the capital degree of an offense (see also U.S. Br. 24, 48-49)-- often "under the guise of resolving issues of evidential doubt."[20/] The Government responds to this and other

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19/ cont'd.

> the death penalty will be imposed upon the return of a verdict of guilty of that crime."
>
> [N.C. Gen. Stat. §15-176.5 (cum.supp.):]
> "Argument to jury on consequences of guilty verdict.- When a case will be submitted to a jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge."

20/ KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966), quoted at Pet. Br. 133. The Government's summary of Kalven & Zeisel (U.S. Br. 70-71) overlooks the authors' "basic thesis . . . that the jury by and large responds to the discipline of the evidence, and where it does not, it conceals from itself its own response to sentiment, under the guise of resolving issues of evidential doubt." KALVEN & ZEISEL, op. cit., at 427. It also ignores the authors' conclusion that "techniques for locating a hard core of capital cases do not put to rest the concern about evenhanded justice. In the end the task is one of deciding who, among those convicted of capital crimes, is to die. Whatever the differences on which this decision hinges, they remain demeaningly trivial compared to the stakes. The discretionary use of the death penalty requires a decision which no human should be called upon to make." Id. at 448-449. The Kalven-Zeisel thesis is dramatically illustrated by State v. Poole, __N.C.__, 203 S.E.2d 786 (1974) (in which the Supreme Court of North Carolina held that appellant had

aspects of admitted sentencing selectivity in the administration of a "mandatory" death penalty[21/] with two basic arguments.[22/] The first is that criminal justice is unavoidably and ineradicably discretionary (U.S. Br. 11-12, 14, 55-60), and that "[i]f a state properly can prescribe the death penalty for at least some crimes, . . . then it is impossible to turn to the Eighth Amendment as a source of a constitutionally-supported principle that this difference in the penalty imposed requires a difference in the process used" (U.S. Br. 57-58). Because the argument either ignores or summarily overrules Furman without benefit of explanation, we see no cause to pursue it. The Government's

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20/ cont'd.

been convicted and sentenced to death for first degree burglary on the basis of insufficient evidence) and by the retrial which followed State v. Spicer, __N.C.__, 204 S.E.2d 641 (1974), in which a defendant whose conviction and death sentence for first degree murder had been reversed by the Supreme Court of North Carolina on the grounds of procedural error was subsequently acquitted of a charge of first degree murder and set free at a retrial. State v. Spicer, New Hanover County Sup. Ct. No. 73-Cr-8034 (Feb. 21, 1975).

21/ See, e.g., U.S. Br. 75-76: "Those whose execution is not averted by one of the avenues of discretionary mercy or constitutional safeguard have been sent to their death because none of a large number of actors thought they deserved to be spared."

22/ A third recurrent argument in the Government's brief -- that "discretion . . . in the criminal justice system . . . reduces the potential punishment a defendant may suffer; it never operates to increase the maximum punishment" (U.S. Br. 66; see also U.S. Br. 13) -- requires no reply beyond Professor Black's quoted at Pet. Br. 76-77 n.116. And compare U.S. Br. 74-75 with Pet. Br. 100.

second argument is that, although discretionary, the manifold selective procedures that determine life or death serve "important goals of criminal justice" (U.S. Br. 63), operate fairly and evenhandedly in most cases (e.g., U.S. Br. 70-73), and are subject to legal or constitutional correction independent of the Eighth Amendment when they do not (e.g., U.S. Br. 12-13, 56-59, 64, 67). It is presumably upon this view that the Government can assume the capital trial process works to visit death "on the worst offenders" (U.S. Br. 39), "a few extreme cases" (U.S. Br. 50), or at least "a few 'exemplary' cases" (ibid.) chosen non-arbitrarily (see U.S. Br. 62). Such assumptions are possible only because the argument is made at a level of theoretical abstraction that declines to "specifically address the North Carolina approach . . . or any particular alternative approach" (U.S. Br. 2; see also id. at 6). Tested by the facts of any particular capital punishment procedure, the Government's theoretical defense of a discretion-laden death-punishing procedure theoretically subject to "independent remedies" (U.S. Br. 64) against aberrational and arbitrary condemnation falls apart.

The most evident such fact in this case, of course, is petitioner Jesse Thurman Fowler's death sentence for a crime that is altogether indistinguishable from hundreds which result in non-capital manslaughter or second degree murder convictions. The Government is manifestly not disposed to support this result, but suggests no way in which the result or similarly arbitrary results can be controlled without reliance on the

Eighth Amendment. The pious pronouncement that "racial or other invidious discrimination occurring . . . at [various] . . . stages of the criminal justice system, is unconstitutional and may be challenged directly" (U.S. Br. 12-13) is simply chimerical in this context.[23/] For the vice which the Government treats as merely adventitious to the administration of a system of capital punishment is in fact endemic to it (see BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974), passim; Pet. Br. 136-140; U.S. Br. 55-77).

23/ The ineluctable arbitrariness of any system in which men are consigned to die "because none of a large number of actors thought they deserved to be spared" (U.S. Br. 76) can obviously not be controlled by application of the Equal Protection Clause. Both the Government (U.S. Br. 45) and North Carolina (N.C. Br. 47) are quick to call the Court's attention to the particularly ugly crimes involved in a case such as Jarrette v. North Carolina, pending on petition for certiorari, No. 73-6877. However, experienced corrections officials have repeatedly pointed out "that I can take you into San Quentin Prison or to Sing Sing, Leavenworth or Atlanta prisons and I can pick out many prisoners in each institution serving life sentences or less, can prove that their crimes were just as atrocious and sometimes more so, than most of those men on the row." Testimony of Clinton T. Duffy, in Hearings Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., on S. 1760, To Abolish the Death Penalty 19,24 (March 20, 21 and July 2, 1968). See also Pet. Br. 43 n.64. At the other end of the spectrum, there are cases, such as the killing of her long-time paramour by the 52 year old black woman in Ward v. North Carolina, pending on petition for certiorari, No. 74-6263, which it is perfectly obvious -- although we know no way to demonstrate it statistically -- almost never result in capital verdicts (although this one did). Petitioner Fowler's case is doubtless one in which many prosecutors or juries would conclude that the defendant "deserved to be spared" (U.S. Br. 76), see Pet. Br., App.C; but petitioner's prosecutor and jury did not take that view. His death sentence is the arbitrary result of an arbitrary system that is so irregular as to defy control under Equal Protection principles for lack of any pattern from which deviations may be judged.

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> " . . . [T]he [death] penalty . . . is not and cannot be administered with even rough equality . . . .
>
> A rigid legislative definition of the cases where the sentence should be death has proved to be unworkable in practice, given the infinite variety of circumstances that attend even the heinous crimes. Therefore, it is inevitable that the jury or the court be given power to decide whether the punishment should be imposed . . . . Discretion means, however, that variations are inevitable, depending on the individuals involved, the jury that may be empanelled, the attitude of the press and public and other accidents of time and place . . . . Yet most dramatically when life is at stake, equality is urged to be a most important element of justice." 24/

This uncontrollable inequality -- this sheer arbitrariness -- brings the uniquely harsh penalty of death within the central concerns of the Eighth Amendment (see Pet. Br. 27-45), as Furman held. For surely it is the very essence of a cruel and unusual punishment that such "social tolerance" (U.S. Br. 8) as it enjoys can be purchased only by infrequent, unequal and irregular applications. See Appendix B, infra, at 8b-15b.

24/ Professor Herbert Wechsler, in Symposium on Capital Punishment, 7 N.Y.L.F. 249, 259 (1961).

2. The Excessive Cruelty of the Death Penalty.

The principal argument advanced by the respondent and its supporting amici against this aspect of our Eighth Amendment contention (Pet. Br. 102-140) is that legislative enactment of death penalty laws demonstrates the acceptability of killing as a punishment under contemporary standards of decency. See, e.g., N.C. Br. 28-29; Cal Br. 36; U.S. Br. 29-31. We anticipated the argument at Pet. Br. 131-140, and will not impose upon the Court by further elaboration of the distinction recognized in Furman between (A) legislative acceptance of a punishment as a regular and usual part of the state's criminal-law machinery and (B) legislative authorization of a punishment to be inflicted in the rare and uncertain cases where it "is not averted by one of [numerous recognized] . . . avenues of discretionary mercy" provided by procedures under which particular defendants "have been sent to their death because none of a large number of actors thought they deserved to be spared" (U.S. Br. 76).

The Government (U.S. Br. 30) and California (Cal. Br. 39) also point to the fact that juries are willing to vote to kill defendants in individual cases, whereas a truly intolerable punishment would be rejected "by the refusal of juries to convict of crimes carrying the . . . punishment" (U.S. Br. 24). However, there would be no purpose to a constitutional guarantee forbidding only Cruel and Unusual Punishments which no jury

will permit to be imposed upon any defendant; and the argument that sometimes capital crimes are prosecuted to a death verdict (and, more rarely, to an execution) ignores the far more striking fact that this outcome is uniformly rejected except for a "bare sample of the ["literally thousands"] of culprits whose conduct makes them eligible for [it]."[25/]

> "The most salient characteristic of capital punishment is that it is infrequently applied. . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." [26/]

Such infrequency and reluctance make "aberrational" (U.S. Br. 24) the cases in which juries are willing to see the defendant suffer death.[27/] And an extreme penalty that is repudiated save

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25/ Professor Herbert Wechsler, quoted at Pet. Br. 134. It should be noted that Professor Wechsler is speaking in 1961 of the death penalty at a time (1930-1959) when it was used far more frequently ("with executions ranging from 199 to 48," ibid.) than it has been used in later years.

26/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (G.P.O. 1967).

27/ The Government suggests that punishments imposed by "administrative officals" are peculiarly subject to Eighth Amendment review because "[t]he smaller the decision-making body, the more likely it is to err in its reading of the demands of the social mores and the less likely the penalty will be brought to public attention for correction" (U.S. 28). The Government does not apply this analysis, however, to the verdicts of particular juries which vote to impose a death sentence in cases where other juries would not (see Pet. Br., App. C), or to a system of administering the death penalty in which its infliction rests upon such verdicts.

in aberrational cases is the very definition of a cruel and unusual punishment.

For the rest, the responding briefs repeat the several justifications which have unvaryingly been advanced to support the death penalty and were previously advanced to sustain live disembowelment and other torturous means of inflicting death. The "moral reinforcement" argument -- whether cast in terms of an "expression of moral outrage" (U.S. Br. 39) or "'public rituals'" (U.S. Br. 40) -- persists with a characteristic lack of explanation in treating criminal convictions followed by severe punishments like life imprisonment as tending to "'forgive the wrongdoer [so as to] . . . end by condoning the crime'" (U.S. Br. 42).[28/] See Cal. Br. 24-25; U.S. Br. 39-44. The "incapacitation" argument characteristically jumps from an assertion of the homicidal dangerousness of "certain offenders" (U.S. Br. 45) to the assertion that "[t]hese individuals can

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28/ Cf. Lord Chancellor Gardiner, in 268 HANSARD, PARLIAMENTARY DEBATES (5th series) 703 (Lords, 43rd Parl., 1st Sess., 1964-1965) (1965): "When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our self-respect."

be detected" (ibid.), without mention of the fact that neither North Carolina law nor any other extant American death penalty law undertakes to detect them, even if they were detectable.[29] See Cal. Br. 28-29; U.S. Br. 44-46. The "deterrence" argument characteristically invokes the common intuition of the persons making the argument and those to whom it is addressed that we would be deterred from crime by the threat of death, as though we were the sorts of persons who would commit violent crimes if not deterred from doing so by fears of execution. See Cal. Br. 29-31; U.S. Br. 32-35. Evidence of the deterrent efficacy of the death penalty is found in the "dramatic increases in murders" (Cal. Br. 26) during the past decade (see N.C. Br. 41 n.55; Cal. Br. 26-27), without mention of the fact that murder has shown by far the lowest rate of increase of all major crimes during this period[30] -- a fact hardly conducive of the conclusion

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29/ For a detailed discussion of this problem, see Furman v. Georgia, 408 U.S. 238, 356-357 (1972)(concurring opinion of Mr. Justice Marshall).

30/ The 1973 Uniform Crime Reports -- the latest that we have found available -- show the following percent changes from 1960 to 1973 in (A) number of offenses, and (B) rate per 100,000 inhabitants, for the seven major crimes:

	(A) Percent increase in number of offenses	(B) Percent increase in rate per 100,000 inhabitants
Murder and non-negligent manslaughter	115.6	86.0
Forcible rape	199.2	155.8
Robbery	256.3	204.5
Aggravated Assault	172.6	132.9
Burglary	181.3	140.3
Larceny	134.3	100.3
Auto theft	183.0	141.8

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES - 1973, table 2 (Sept. 6, 1974) at 59.

that the rate of crimes supposed to be deterred by capital punishment has risen disproportionately to other crimes as "the annual number of executions in the United States dwindled to nothing" (Cal. Br. 26). The Government's "sophisticated regression analysis" (U.S. Br. 9), once it has been analyzed, turns out to contain the same simple error, among numerous others.[31] With the utmost deference, we find nothing in the justifications offered for the death penalty by respondent or its supporting amici that warrant our expanding upon our previous discussion of the subject at Pet. Br. 121-130 and App. E at 1e-10e.

31/ Because the Government has lodged with the Court an unpublished manuscript entitled "The Deterrent Effect of Capital Punishment: A Question of Life or Death" (National Bureau of Economic Research Working Paper No. 18, November 1973) written by Isaac Ehrlich, and because the recondite form of that paper entails the danger that its unintelligibility will obscure its insignificance, we attach a brief analysis of it as Appendix C, infra. See also Appendix E. We find it particularly surprising that the Government sees the value of the paper in its supposed attempt to "hold constant factors other than the death penalty that might influence the rate of murders" (U.S. Br. 37; see also id. at 38), since Ehrlich has (A) chosen a method of mathematical analysis that is peculiarly sensitive to the effect of omitting critical variables, and (B) proceeded to omit numerous critical variables (including one that his own earlier work concluded was critical, see Appendix C, infra at 12-13c) while seizing upon only those variables which work to convert an initial finding of positive correlation between "the reported murder rate and estimates of the objective risk of execution given conviction of murder" (Ehrlich manuscript, supra, at 32) into a negative correlation. For present purposes, however, it is sufficient to note that Ehrlich's ultimate negative correlation (even if one ignores all of the other defects of his methodology) depends exclusively upon the effect of the period of the 1960's; and that he singularly fails to control for factors that produced a general rise in the crime rate -- a rise that is higher than the rise in the capital crime rate, see note 27 supra -- during this latter period.

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APPENDIX A

Capital Punishment Statutes Enacted

Since Furman v. Georgia

VIRGINIA

Virginia provides the death penalty for some cases of "capital murder." "Capital murder" is defined and classified as a "class 1 felony" by Va. Code §18.2-31 (1975 Virginia Laws, c. 14 (Feb. 14, 1975)):

> "(a) the wilful, deliberate and premeditated killing of any person in the commission of abduction, as defined in §18.2-48 [1/], when such abduction was committed with the intent to extort money, or a pecuniary benefit;
>
> (b) the wilful, deliberate and premeditated killing of a human being by another for hire; and
>
> (c) the wilful, deliberate and premeditated killing by an inmate in a penal institution as defined in §53-19.18 [2/], or while in the custody of an employee thereof."

Virginia Code §18.2-10 (1975 Virginia Laws, c. 14 (Feb. 14, 1975)) provides that the authorized punishment for conviction of a class 1 felony is death. No new capital procedure is provided.

No standards are provided to govern prosecutorial discretion in seeking and filing capital charges. Convictions of lesser included offenses and negotiated pleas to lesser included offenses are not prohibited in capital cases. The Governor's clemency power in capital cases is left unaltered.

These statutes become effective on October 1, 1975.

1/ Virginia Code §18.2-48 (1975 Virginia Laws, c. 14 (Feb. 14, 1975)) provides:

> "Abduction with intent to extort money or for immoral purpose.— Abduction with the intent to extort money, or pecuniary benefit, abduction of any person with intent to defile such person, and abduction of any female under sixteen years of age for the purpose of concubinage or prostitution, shall be a class 2 felony."

Virginia Code §18.2-47 (1975 Virginia Laws, c. 14 (Feb. 14, 1975)) provides:

> "Abduction and kidnapping; defined and punishment.— Any person, who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes the person of another, with the intent to deprive such other person of his personal liberty, or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of 'abduction'; but the provisions of this section shall not apply to any law enforcement officer in the performance of his duty. The terms 'abduction' and 'kidnapping' shall be synonymous in this Code."

2/ Virginia Code §53-19.18 (1974) defines "penal institution" as "every prison, prison camp, prison farm or correctional field unit . . . and every jail, jail farm, lockup or other place of detention . . . [but not including] any industrial school or other institution established solely for the detention of juvenile delinquents."

APPENDIX B

Brief for Petitioner,

Aikens v. California, 406 U.S. 813 (1972)

[No. 68-5027] at 13-27.

whether death is a cruel and unusual punishment within the meaning of the Constitution of a Nation which aspires to be one of the world's more enlightened peoples.

But our approach to the Eighth Amendment concentrates primarily upon the evolution of the death penalty in the United States itself. Properly viewed, that evolution has brought this country to a stage at which the relevant constitutional indicators of a cruel and unusual punishment have abundantly matured. America has had its time of "experimentation"[23] with the killing of men; the experiment has led to one inexorable conclusion; and further development can only make more manifest—at a terrible cost—what is already manifest and manifestly fitting as a basis for judicial application of the Constitution. To demonstrate why this is so, we first discuss the nature of the Eighth Amendment's concern against cruel and unusual punishments, and then proceed to test the death penalty in light of that concern.

II. THE RELEVANT EIGHTH AMENDMENT STANDARD

At the heart of the Eighth Amendment[24] lurks an extraordinary dilemma whose resolution is, we think, the key to decision of this case. The dilemma arises from the confrontation of three basic principles.

Iran, Mali, Mexico (29 of whose 32 jurisdictions have legally abolished the death penalty), Nicaragua, Pakistan, Sierra Leone, Sudan and the Republic of Viet Nam. These latter countries would therefore have to account for more than a quarter of the executions in the non-communist world in order to bring the non-communist total, exclusive of the United States, to 660 according to Patrick's figures. And Patrick's figures appear to be unduly high. See note 51, *infra*.

[23] See *Powell v. Texas*, 392 U.S. 514, 536-537 (1968) (plurality opinion of Mr. Justice Marshall); *Williams v. Florida*, 399 U.S. 78, 138 (1970) (separate opinion of Mr. Justice Harlan).

[24] The Cruel and Unusual Punishment Clause of the Eighth Amendment is made applicable to the States through the Due Process Clause of the Fourteenth. *Robinson v. California*, 370 U.S. 660 (1962), so holds; and there can be little doubt that this Bill of Rights guarantee,

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First, in the context of American government, the Eighth Amendment's proscription of cruel and unusual punishments forbids the legislative enactment of such punishments as well as the judicial imposition of them. This has always been accepted. *Weems v. United States*, 217 U.S. 349, 366, 378-379, 382 (1910); *Trop v. Dulles*, 356 U.S. 86, 103-104 (1958) (plurality opinion of Chief Justice Warren); *Robinson v. California*, 370 U.S. 660 (1962); and see *Wilkerson v. Utah*, 99 U.S. 130, 133, 136-137 (1879) (dictum); *In re Kemmler*, 136 U.S. 436, 446-447 (1890) (dictum).

Second, the force of the Amendment is not limited to the prohibition of those atrocities that would have turned the stomachs of the Framers in the Eighteenth Century.[25]

whose "basic concept . . . is nothing less than the dignity of man," *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren), satisfies the most restrictive test for adoption as a measure of due process. Its derivation from times anterior to Magna Carta (see Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 845-846 (1969)) through the Bill of Rights of 1689 (1 Wm. & Mary, sess. 2, ch. 2, preamble, clause 10) amply establishes that it is a " 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Palko v. Connecticut*, 302 U.S. 319; 325 (1937). The point did not escape Patrick Henry in 1788. "What has distinguished our ancestors?–That they would not admit of tortures, or cruel and barbarous punishment." 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1863), 447.

For convenience, we shall speak simply of the Eighth Amendment throughout this brief, meaning thereby the Cruel and Unusual Punishment Clause as it measures the liberty protected by the Due Process Clause of the Fourteenth Amendment.

[25]Certainly the Eighth Amendment does bar those atrocities, but they mark only the core of minimum content of its prohibition. This is what was meant in *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879), by the observation that, although the exact extent of the Cruel and Unusual Punishment Clause is difficult of definition, "it is safe to affirm that punishments of torture . . . , and all others in the same line of unnecessary cruelty, are forbidden." *Wilkerson* does not suggest, as the *Weems* dissent seems to imply, that torture is the outer limit of the Amendment. *Weems v. United States*, 217 U.S. 349, 400-401

This conclusion is compelled by both authority and reason. "[I]t is a constitution we are expounding,"[26] and the Constitution "states or ought to state not rules for the passing hour, but principles for an expanding future."[27] Thus, *Trop v. Dulles*, 356 U.S. 86 (1958), outlawed the hoary penalty of banishment with the observations that the scope of the Cruel and Unusual Punishment Clause "is not static," and that the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Id.*, at 101 (plurality opinion of Chief Justice Warren).) See also *Robinson v. California*, 370 U.S. 660, 666 (1962) (referring to "the light of contemporary human knowledge"); *Jackson v. Bishop*, 404 F.2d 571, 578-580 (8th Cir. 1968); *Goss v. Bomar*, 337 F.2d 341, 342-343 (6th Cir. 1964) (*dictum*). Such a conception of evolving standards is a constitutional commonplace,[28] and is firmly

(1910) (Mr. Justice White, dissenting). Nor could the Amendment be so limited for the reasons stated convincingly by the majority in *Weems:*

> ". . . [S]urely [the Framers] . . . intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. . . . [I]f we are to attribute an intelligent providence to [the Eighth Amendment's] . . . advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked." (*Id.* at 372-373.)

[26]*M'Culloch v. Maryland*, 4 Wheat. 316, 407 (1819).

[27]CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), 83

[28]E.g., *Brown v. Board of Education*, 347 U.S. 483, 492-493 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted . . . ."); *Ex parte Wilson*, 114 U.S. 417, 427-428 (1885) ("What punishments shall be considered as infamous [for purposes of the Fifth Amendment's indictment

entrenched in the jurisprudence of the Eighth Amendment in particular. The Cruel and Unusual Punishment Clause

requirement] may be affected by the changes of public opinion from one age to another.") Reference was made to *Wilson* and to *Mackin v. United States*, 117 U.S. 348, 351 (1886), in *Weems v. United States*, 217 U.S. 349, 378 (1910), which canvassed the subject in this frequently quoted passage:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction. There is an example of this in *Cummings v. State of Missouri*, 4 Wall. 277, where the prohibition against *ex post facto* laws was given a more extensive application than what a minority of this court thought had been given in *Calder v. Bull*, 3 Dall. 386. See also *Ex parte Garland*, 4 Wall. 333. The construction of the 14th Amendment is also an example, for it is one of the limitations of the Constitution. In a not unthoughtful opinion Mr. Justice Miller expressed great doubt whether that Amendment would ever be held as being directed against any action of a State which did not discriminate 'against the negroes as a class, or on account of their race.' *Slaughterhouse Cases*, 16 Wall. 36, 81. To what extent the Amendment has expanded beyond that limitation need not be instanced.
>
> "There are many illustrations of resistance to narrow constructions of the grants of power to the National Government. One only need be noticed, and we select it because it was made against a power which more than any other is kept present to our minds in visible and effective action. We mean

"may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910).

To deny this dynamic character to the Eighth Amendment would produce inconceivable results. Appendix C to this brief sets forth some of the punishments legally in force and commonly in use in this country during the period when the Cruel and Unusual Punishment Clause was written and adopted. If 1791 is indeed the constitutional benchmark and if the Constitution does not forbid capital punishment today upon the theory that it was widely allowed by law and practice in 1791, then the Eighth Amendment also does not forbid today—and will never forbid—the stocks and the pillory, public flogging, lashing and whipping on the bare body,[29] branding of cheeks and forehead with a hot

> the power over interstate commerce. This power was deduced from the eleven simple words, 'to regulate commerce with foreign nations and among the several States.' The judgment which established it was pronounced by Chief Justice Marshall (*Gibbons v. Ogden*), and reversed a judgment of Chancellor Kent, justified, as that celebrated jurist supposed, by a legislative practice of fourteen years and fortified by the opinions of men familiar with the discussions which had attended the adoption of the Constitution. Persuaded by such considerations the learned chancellor confidently decided that the Congressional power related to 'external, not to internal, commerce,' and adjudged that under an act of the State of New York, Livingston and Fulton had the exclusive right of using steamboats upon all of the navigable waters of the State. The strength of the reasoning was not underrated. It was supported, it was said, 'by great names, by names which have all the titles to consideration that virtue, intelligence and office can bestow.' The narrow construction, however, did not prevail, and the propriety of the arguments upon which it was based was questioned. It was said, in effect, that they supported a construction which ' would cripple the government and render it unequal to the objects for which it was declared to be instituted, and to which the powers given, as fairly understood, render it competent' . . . ." (*Id.* at 373-375.)

[29] Whipping was not thought to be a particularly serious punishment in the late eighteenth century. "[B]y the first Judiciary Act of the United States, whipping was classed with moderate fines and short

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iron, and the slitting, cropping, nailing and cutting off of ears. Further discussion of a "static" theory of the Eighth Amendment seems unnecessary.[30]

Third, in applying the Eighth Amendment to advancing and changing times, the courts are to be guided by the touchstone of "contemporary human knowledge,"[31] "public opinion . . . enlightened by a humane justice,"[32] and "the evolving standards of decency that mark the progress of a maturing society."[33] What other standards, after all, could possibly be used? Surely it was not the purpose of the Eighth Amendment that succeeding generations of judges should mirror in it their own, individual philosophies of the criminal sanction. So, if the obsolete and eldritch customs of 1791 are not to be perpetually controlling, where else may judges look but to enlightened public opinion for conception of the "cruel and unusual punishments" which the Constitution forbids?

And there stands the dilemma. Quite perceptibly, an extreme difficulty must attend any process of constitutional adjudication by which this Court subjects legislation to the

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terms of imprisonment in limiting the criminal jurisdiction of the District Courts to cases 'where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted.' Act of September 24, 1789, chap. 20, § 9; 1 Stat. at L., 77." *Ex parte Wilson*, 114 U.S. 417, 427-428 (1885).

[30]The argument has sometimes been advanced that the Eighth Amendment cannot forbid capital punishment consistently with the indictment clause of the Fifth, which speaks of (and, so the argument goes, constitutionalizes) "capital . . . crime." This reasoning, like the static theory of the Eighth Amendment generally, proves too much. For the double jeopardy clause of the constitution also speaks of "jeopardy of life *or limb*." (Emphasis added.)

[31]*Robinson v. California*, 370 U.S. 660, 666 (1962).

[32]*Weems v. United States*, 217 U.S. 349, 378 (1910).

[33]*Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

test of "enlightened public opinion," and adjudges the validity of a legislature's product according to society's "standards of decency." For, both in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency. If the question asked by the Eighth Amendment really be whether our democratic society can tolerate the existence of any particular penal law that is on the books, the Eighth Amendment's answer will always be that it can—and for the simple reason that the law is on the books of a democratic society.[34] The conclusion therefore seems to be required either that the Eighth Amendment is *not* a judicially enforceable restriction upon legislation;[35] or that the *Weems-Trop* test referring to contemporary public standards of decency is not a usable measure of the Amendment; or else that the question which we have just posed is not the proper question to which the Amendment and the *Weems-Trop* test respond.

As this way of putting the matter suggests, we think that the question—whether the maintenance of a particular harsh penalty on the statute books is consistent with prevailing standards of decency—is the wrong question. We suggest what we think is the right one below. For we cannot believe that the Eighth Amendment is not a restriction upon

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[34]Mr. Justice Story therefore wrote that the Eighth Amendment "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct" as the Amendment forbids. 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (4th ed. 1873), 623. This observation has undoubted merit with regard to penal laws that are generally and uniformly enforced, but it is inapplicable to selectively and rarely enforced punishments. Precisely in regard to such "cruel *and unusual* punishments," the Amendment is most necessary.

[35]See *State v. Cannon*, 55 Del. 585, 190 A.2d 514 (1963), sustaining the punishment of whipping in an opinion which effectively denies any judicial review of legislation under the Cruel and Unusual Punishment Clause.

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cruel and unusual penal legislation rightly enforceable by this Court. Nor can we believe that the Amendment's prohibition is restricted to live disembowelment and similar long-gone butcheries–nor, on the other hand, that it invokes the unassisted penological impressions of particular Justices. The *Weems-Trop* test *is*, we submit, the proper one. Common standards of decency in our contemporary society *do* set the limits of punishment allowable under the Eighth Amendment. The problem is how those standards are to be ascertained, and with regard to what specific question.

We begin with the specific question. When a man such as Earnest Aikens comes before the Court claiming that the law under which he was sentenced provides for an unconstitutional cruel and unusual punishment, the question is not: will contemporary standards of decency allow the existence of such a general law on the books? The question is, rather: will contemporary standards of decency allow the general application of the law's penalty *in fact*? The distinction which we draw here lies between what public conscience will allow the law to *say* and what it will allow the law to *do*--between what public decency will permit a penal statute to threaten and what it will allow the law to carry out–between what common revulsion will forbid a government to put upon its statute books as the extreme, dire terror of the State (not to be ordinarily, regularly or in other than a few rare cases enforced), and what public revulsion would forbid a government to do to its citizens if the penalty of the law were generally, even-handedly, non-arbitrarily enforced in all of the cases to which it applied.

This last point–regarding general, even-handed, non-arbitrary application is critical. For in it lies, we think, a large part of the need to have a Cruel and Unusual Punishment Clause in the Constitution, and of the need to have courts enforce it. The government envisaged for this country by the Constitution is a democratic one, and in a democracy there is little reason to fear that penal laws will be placed upon the books which, in their general application,

would affront the public conscience. The real danger concerning cruel and inhuman laws is that they will be enacted in a form such that they can be applied sparsely and spottily to unhappy minorities, whose numbers are so few, whose plight so invisible, and whose persons so unpopular, that society can readily bear to see them suffer torments which would not for a moment be accepted as penalties of general application to the populace.[36]

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[36] A recent detailed analysis of the historical origins of the cruel and unusual punishment clause of the Eighth Amendment demonstrates that the provision of the English Bill of Rights of 1689 from which the Eighth Amendment's language was taken *verbatim* was concerned primarily with the irregular, selective application of harsh (but not intrinsically barbaric) punishments; and that its cardinal aim was to forbid the oppressive exercises of a legally unregulated power to mete out severe punishments arbitrarily. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 845-847, 852-860 (1969). To be sure, Granucci also finds that the American Framers imperfectly understood the English background of the Cruel and Unusual Punishment Clause, and that they were themselves principally concerned with the problem of intrinsically barbaric penalties. But this does not support a conclusion that the Framers meant to wholly alter the meaning of the guarantee which they found in the English traditions, or to reject protections of the citizen long preserved by their English heritage.

The debates in Congress and in the ratifying conventions concerning the Eighth Amendment are set forth in Appendix D to this brief. Discussion of the Cruel and Unusual Punishment Clause was notably brief; and only one or two of those who voted for it spoke. What they said unquestionably sustains the view that they meant to *include* in the guarantee a proscription of inherently barbarous penalties. It does not sustain the view that they meant to jettison other restrictions upon punishment which were encompassed by the language that they took as embodying the basic rights of the citizen evolved through the course of English history. To the contrary, it is apparent that the principal motive force behind inclusion of the Eighth Amendment in the Constitution was the relatively simple and imprecise notion that its guarantees had always been recognized as restrictions upon English government, and that the new national government established by the Constitution and given considerable powers over individuals could not safely be unleashed from the same safeguards.

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Herein is found the difference between the judgment which the legislator makes, responding *politically* to public conscience, and the judgment which a court must make under the obligation that the Eighth Amendment imposes upon it to respond *rationally* to public conscience. A legislator may not scruple to put a law on the books (still less, to maintain an old law on the books) whose general, even-handed, non-arbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily. But a court cannot sustain such a law under the Eighth Amendment. It cannot do so because both the Amendment itself and our most fundamental principles of due process and equal protection forbid American governments the devices of arbitrariness and irregularity, even as a sop to public conscience.

To put the matter another way, there is nothing in the political process by which public opinion manifests itself in legislated laws that protects the isolated individual from being cruelly treated by the state. Public conscience often will support laws enabling him to be so mistreated, provided that arbitrary selection can be made in such a fashion as to keep his numbers small and the horror of his condition mute.[37] Legislators neither must nor do take account of

[37]William Forsyth wrote:

> "... When in respect of any class of offenses the difficulty of obtaining convictions is at all general in England, we may hold it as an axiom, that the law requires amendment. Such conduct in juries is the silent protest of the people against its undue severity. This was strongly exemplified in the case of prosecutions for the forgery of bank-notes, when it was a capital felony. It was in vain that the charge was proved. Juries would not condemn men to the gallows for an offense of which the punishment was out of all proportion to the crime; and as they could not mitigate the sentence they brought in verdicts of Not Guilty. The consequence was, that the law was changed; and when secondary punishments were substituted for the penalty of death, a forger had no better chance of an acquittal than any other criminal. Thus it is that the power which juries possess of refusing to put the law in force has, in the words of Lord John Russell, 'been the

such individuals.[38] But it is the precise business of courts to take account of them, and to disallow under the Eighth Amendment the application to them of penalties so harsh that public conscience would be appalled by their less arbitrary application.[39]

We shall develop this theme more fully, in the pages that follow, with regard to the death penalty. But we have said enough, at this point, to enable us to state our major submission on behalf of Earnest Aikens. His sentence of death for the crime of first-degree murder is an unconstitutional

> cause of amending many bad laws which the judges would have administered with professional bigotry, and above all, it has this important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made, can not long prevail in England.'"

FORSYTH, HISTORY OF TRIAL BY JURY (2d ed. 1878), 367-368. However, as this Court recognized in *McGautha v. California*, 402 U.S. 183 (1971) the American Legislative response to "the problem of jury nullification" in capital cases was to substitute discretionary for mandatory capital sentencing provisions. In this way, laws which might be "totally repugnant to the feelings of the community" as applied to the generality of cases could nevertheless be preserved for sporadic application, free of the pressures of either jury nullification or public pressure on the legislature.

[38]See *Ralph v. Warden*, 4[illegible] F.2d 786, 792 (4th Cir. 1970):

> "Although the legislature has the responsibility of establishing criminal penalties, subject only to constitutional limitations, popular acceptance or rejection of capital punishment is reflected by the incidence of actual executions. When the death penalty for rape is exacted with the infrequency that the statistics disclose, there is little pressure for amendment. Public awareness diminishes as the frequency of imposing the penalty decreases, and legislative action is not likely to be prompted when the consequences befall only a few prisoners. For purposes of ascertaining evolving standards, the retention of the death penalty for rape in the codes of some states is less significant than its steady fall into disuse and the present moratorium on executions."

[39]A somewhat similar analysis leads Goldberg and Dershowitz to the conclusion that "A penalty ... should be considered 'unusually' imposed [in the sense of the Eighth Amendment] if it is administered arbitrarily or discriminatorily." Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970).

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cruel and unusual punishment because it affronts contemporary standards of decency, universally felt, that would condemn the use of death as a penalty for that crime if such a penalty were uniformly, regularly, and even-handedly applied either to all first-degree murderers or to any reasonable proportion of those eligible for the penalty under California law.[40]

We use the term "reasonable proportion" in order to exclude the sort of tolerance which a law may obtain through rare--or, in the constitutional sense, "unusual"[41]--applica-

[40]In saying this, we do not ignore the aggravating features of Earnest Aikens' own case. Those features are immaterial for present purposes, because under California law Aikens' sentence of death need not, and does not, depend upon them. Cases presenting the same or worse features might result in a life sentence; cases presenting strongly mitigating circumstances might draw down a death verdict. It is meaningless to ask how enlightened public opinion would react to any particular case. The relevant Eighth Amendment touchstone is the judgment of enlightened public opinion upon the use of the penalty prescribed for the crime defined by law.

[41]"Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. See *Weems v. United States*, . . . ; *O'Neil v. Vermont*, . . . ; *Wilkerson v. Utah*, ... These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.' But cf. *In re Kemmler*, . . . ; *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 430 (Brandeis, J., dissenting). If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done." *Trop v. Dulles*, 356 U.S. 86, 100-101 n. 32 (1958) (plurality opinion of Chief Justice Warren). We think that the constitutional word "unusual" does have some meaning, see note 36, *supra*; and that in determining whether a particular punishment is "unusual" or "different from that which is generally done," it is necessary to look to the actual infliction of the punishment, not its mere statutory authorization. See *Ralph v. Warden*, 438 F.2d 786, 792, (4th Cir. 1970), quoted in note 38, *supra*; *O'Neil v. Vermont*, 144

tion. We do so for the reasons which we have just stated: that is, because we believe that the Cruel and Unusual Punishment Clause is designed precisely to condemn any penalty so oppressive that it can command public acceptance only by virtue of extremely infrequent and sporadic enforcement. Laws are written to be enforced with practicable generality in the cases to which they apply; and so it is a fair measure of a law's acceptability to imagine its general enforcement. Let us do so with regard to capital punishment for first-degree murder.

Let us take a very modest standard of generality and assume that the United States were to execute 184 first-degree murderers this year. We have chosen that figure--in the absence of any obtainable information concerning the number of first-degree murder convictions annually[42]--because it represents the largest number of murderers executed in the country since reliable counts began to be kept in 1930. During the year 1935, 184 men and women were put to death for murder in the United States.[43] Of course, it is absurd to suppose that as few first-degree murder convictions are returned yearly in the 1970's as in the 1930's; and

U.S. 323, 337, 338 (1892) (Mr. Justice Field, dissenting). *Cf. Wilkerson v. Utah*, 99 U.S. 130, 135 (1879), which, after recounting Blackstone's enumeration of the methods of execution authorized by English law (*i.e.*, live disembowelment, beheading and quartering), adds: "History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect."

[42]See Appendix F *infra*. And see Bedau, *Volume and Rate of Capital Crimes*, in BEDAU, THE DEATH PENALTY IN AMERICA (Rev. ed. 1967) [hereafter cited as BEDAU], 56-74.

[43]UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 45, *Capital Punishment 1930-1968* (August 1969) [hereafter cited as NPS (1968)], p. 7.

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even in the 1930's such knowledgeable observers as Warden Lewis E. Lawes of Sing Sing recognized that the death penalty was not being generally enforced.[44] Nonetheless, let us take the 1935 national high-water mark of 184 first-degree murderers as a measure of some generality of enforcement of the death penalty for murder.

Imagine now 184 electrocutions and gassings in the United States in 1971. That is four times the number of human beings executed during any of the past ten years, and exceeds by 50 the total number of executions for the ten-year period.[45] If, in fact, 184 murderers were to be executed in this year 1971, we submit it is palpable that the public conscience of the Nation would be profoundly and fundamentally revolted, and that the death penalty for murder would be abolished forthwith as the atavistic horror that it is. Our detailed reasons for this submission follow. First, we pause for one additional paragraph to make our legal point clear.

We disagree not at all with the reasoning process, but we dispute the factual premise--unexamined then and now demonstrably incorrect--of the *dictum* announced by this Court thirteen years ago in *Trop v. Dulles*, 356 U.S. 86 (1958):

> ". . . Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment--and they are forceful--the death penalty has been employed throughout our history, and, *in a day when it is still widely accepted*, it cannot be said to violate the constitutional concept of cruelty." (*Id.* at 99 (plurality opinion of Chief Justice Warren; emphasis added).)

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[44] LAWES, TWENTY THOUSAND YEARS IN SING SING (1932), 306-307, quoted at note 96, *infra*.

[45] See p. 37, *infra*.

We think that it is simply not correct that the death penalty is today "still widely accepted." We speak, for the reasons that we have already stated, not of its acceptance on the pages of the statute books, but of its acceptance in actual usage--and of such acceptance as it does not illegitimately obtain by being irregularly and arbitrarily applied. Far from being "widely accepted", the death penalty today is with rare public unanimity rejected and repudiated. We proceed next to demonstrate this point and to develop its constitutional implications.

III. THE PENALTY OF DEATH

The acceptance which a punishment is given by contemporary society, and its acceptability under that society's prevailing standards of decency, may be measured by objective indicators. In the case of the death penalty today, numerous indicators point in a single direction. Language requires that we state them one by one; but it is their plain convergence that, we think, marks the punishment of death as unacceptable, cruel and unusual.

(1) All informed observers of the death penalty agree in describing a world-wide trend toward its disuse that is nothing short of drastic.[46] This has been a relatively constant long-

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[46] UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) [hereafter cited as UNITED NATIONS] 81-82, 96-97, UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, Note by the Secretary-General, *Capital Punishment* (E/4947) (February 23, 1971), pp. 3, 10; SELLIN, THE DEATH PENALTY (1959), published as an appendix to AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959) [hereafter cited as SELLIN (1959)], 4-14; Sellin, *The Inevitable End of Capital Punishment*, in SELLIN, (1967), 239-240; MATTICK, THE UNEXAMINED DEATH (1966) [hereafter cited as MATTICK], 5-6, WEIHOFEN, THE URGE TO PUNISH (1956) [hereafter cited as WEIHOFEN], 163-164; OHIO LEGISLATIVE SERVICE COMMISSION, STAFF RESEARCH REPORT No. 46, CAPITAL PUNISHMENT (1961), 16-30; Barry, *Hanged by the Neck Until . . .*, 2 SYDNEY L. REV. 401, 411 (1958);

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Analysis of Ehrlich Manuscript

On March 7, 1975, the Solicitor General of the United States lodged with the Court an unpublished manuscript by Isaac Ehrlich entitled "The Deterrent Effect of Capital Punishment: A Question of Life and Death" (National Bureau of Economic Research Working Paper No. 18, November 1973).[1] The author of this paper uses the statistical technique of linear regression analysis in an attempt to demonstrate that the threat of execution had a deterrent effect on the homicide rate in the United States between 1935 and 1969. His conclusion is that each additional execution during the period might "have deterred approximately eight murders." (U.S. Br. 35).

Linear regression analysis[2] is commonly employed by social scientists to examine hypothesized relationships between variables (e.g., the effect of cholesterol levels upon heart attacks, of a particular nutrient upon plant growth, of tax rates upon business investment). However, regression analysis is an exceptionally brittle tool of limited usefulness[3] if conditions make

1/ The cover of this paper bore the inscription: "NBER working papers are distributed informally and in limited number for comments only. They should not be quoted without written permission. This report has not undergone the review accorded official NBER publications; in particular, it has not yet been submitted for approval by the Board of Directors." In a March 27, 1975, letter responding to an inquiry from petitioner's counsel, National Bureau of Economics Research President John R. Meyer explained further that "The working paper in question has not been approved for National Bureau publication nor has it been submitted for approval .... It was not available to interested members of the public. A very limited number was circulated to interested scholars .... The NBER will not be publishing a paper on this subject in June 1975 nor is it considering publication at this time." (The full text of this letter is attached as Appendix D.) This NBER working paper will be referred to hereinafter as EHRLICH.

2/ For fuller explanation of this technique, see ANDERSON, INTRODUCTION TO MULTIVARIATE STATISTICAL ANALYSIS (1958); EATON, MULTIVARIATE STATISTICAL ANALYSIS (1972); KSHIRSAGAR, MULTIVARIATE ANALYSIS (1972).

3/ See, e.g., Campbell & Erlebacher, How Regression Artifacts in Quasi-Experimental Evaluations Can Mistakenly Make Compensatory Education Look Harmful, in 3 HELLMUTH, COMPENSATORY EDUCATION: A NATIONAL DEBATE 185-209 (1970).

it impossible to validate regression results with controlled experimentation. ...

> "[i]n most circumstances, ... any indications produced by a multiple regression analysis of observational data are merely a good hint to try for confirmation by a proper experiment. In a true experiment the independent variables will be properly randomized with a table of random numbers and will have low correlations differing from zero by only random fluctuation, or else in a completely balanced experiment the correlations will be exactly zero.
>
> The justification sometimes advanced that a multiple regression anaylsis on observational data can be relied upon if there is an adequate theoretical background is utterly specious and disregards the unlimited capability of the human intellect for producing plausible explanations by the carload lot." 4/

Regression analysis without controlled experimentation is especially dangerous when applied to phenomena affected by numerous variables because of the extraordinary sensitivity of the technique to omission of variables or misspecification of the mathematical form of relevant variables and its limited ability to reveal causal relationships among included variables. Furthermore, when the observed data constitute time series, spurious relationships are particularly likely to appear.[5] For all these reasons, it is necessary to use the utmost care in deriving policy implications from multivariate analysis: "multiple linear regression techniques ... can be very useful but also very dangerous if improperly used and interpreted .... [The results are] easily misused and misunderstood."[6]

Although the mathematical analysis in the Ehrlich manuscript is technical, the basic demonstration undertaken is relatively simple. Ehrlich attempts to use regression analysis to estimate the effect of one variable — the execution rate — upon the rate

4/ BROWNLEE, STATISTICAL THEORY AND METHODOLOGY IN SCIENCE AND ENGINEERING 455-456 (2 ed. 1965).

5/ SNEDECOR & COCHRAN, STATISTICAL METHODS 189 (6th ed. 1968); Yule, Why Do We Sometimes Get Nonsense-Correlations Between Time-Series? A Study in Sampling and the Nature of Time, 89 J. ROYAL STATIS. SOC. 1-69 (1926).

6/ DRAPER & SMITH, APPLIED REGRESSION ANALYSIS 234-236 (1966).

variables which he posits will also have an impact on the number of murders. He begins with the "basic proposition" that "the propensity to perpetrate ... [capital] crimes is influenced by the prospect of gains and losses associated with their commission." EHRLICH 5.[7] Assuming that the murder rate is a function of eight independent variables — probability of arrest (P_a); probability of conviction given arrest ($P_{c|a}$); probability of execution given conviction ($P_{e|c}$); national aggregate measures of the percentage of the population between age 14 and 24 (A); unemployment (U); labor force participation (L); permanent income (Y_p); and chronological time (T) — Ehrlich further assumes that the murder rate may be expressed in exponential form by the following equation:[8]

$$\text{murder rate} = K P_a^{\alpha_1} P_{c|a}^{\alpha_2} P_{e|c}^{\alpha_3} U^{\beta_1} L^{\beta_2} Y_p^{\beta_3} A^{\beta_4} T^{\beta_5} (\exp)^{v}$$

In other words, he assumes that the murder rate is a function of these particular eight variables in the particular relationship to each other and to murder that his mathematical equation expresses. He reports results using the logarithmic rather than the natural values of his variables. After estimating values of the three deterrence variables, P_a, $P_{c|a}$, $P_{e|c}$, he uses a computer computational technique to select coefficients for the independent variables which fit his particular equation to the data. He

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7/ Ehrlich further posits that "[t]here is no a priori reason to expect those who hate, or, for that matter, those who love other persons to be less responsive to changes in costs and gains associated with activities they may wish to pursue in accordance with their preferences than persons who are indifferent toward the well-being of others," EHRLICH 6; that the death penalty constitutes for the average potential criminal a more severe form of punishment than life imprisonment, id. at 8; and that "a necessary and sufficient condition for murder to occur" is that a potential murderer's "expected utility from crime exceed his expected utility from an alternative (second best) action," id. at 7.

8/ In this equation, the term "(exp)" denotes the base of natural logarithms and "v" denotes a random error variable with zero mean and a finite variance. In the regression, the natural logarithm of the variable T in modified first differences is not used; rather, the modified first difference of the variable itself is utilized. See EHRLICH 27.

1935-1969 and concludes that each additional execution during this period would have prevented "7 or 8," EHRLICH 42, "30," id. at 43, "32," ibid., "1 to [sic] 17," ibid., or "between the limits of 0 and 24," ibid., murders.

Although the Government's brief asserts that "this study at the least indicates that there is important empirical support for the a priori logical belief that the use of the death penalty decreases the number of murders" (U.S. Br. 36), an examination of the Ehrlich manuscript reveals that such a conclusion is completely unfounded. The paper is riddled with theoretical and technical errors that render its conclusions meaningless. Despite the complicated array of mathematical symbols and econometric terminology, the draft is a creation of mere arbitrary assumptions, misleading summarizations, and reckless inferences. It is marked by evasiveness about data sources and failure to test effectively the validity of the theoretical model on which the paper's conclusions depend. The nature of the evidence and analysis which it marshals in support of the argument for the deterrent effect of capital punishment is of such poor quality that the manuscript casts no doubt at all on the conclusion of every other systematic study over half a century:[9] that the

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9/ Ehrlich's "sophisticated regression analysis" (U.S. Br. 9) is, in fact, inferior in several respects to the less hieroglyphical earlier studies. Behind the Ehrlich model is the assumption, see p. 10c infra, that whatever variables determine the murder rate in, for example, Vermont also determine the murder rate in exactly the same way in Mississippi. The data in the paper is derived from the United States as an undifferentiated whole, and the estimating procedures encompass all States, including those which have abolished the death penalty. Ehrlich's failure to specify data sources (as noted infra, see note 18) makes it impossible to be certain how some data is derived; but he frequently adverts generally to National Prisoner Statistics (see, e.g., EHRLICH F8 n.23; F11 n.29). His aggregation of this data, without indicating its limitations, ignores the explicit warning attached to the NPS statistics by the United States Department of Justice:

> "'Whereas NPS is a voluntary program, many reporting jurisdictions have been unable to provide program data to due [sic] exigencies related to each budget, personnel, or program situation. As a result, the statistics

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crime penalty shows no deterrent effect upon murders.

1. Arbitrary Choice of Explanatory Equation.

Regression analysis often requires the use of essentially

9/ (cont'd)

> * * * are not complete and do not represent composite nationwide figures. [Consequently they] should be used primarily in making year-to-year comparisons in those States where all required information was reported.' . . . Particular care should be taken in analyzing differences from year to year, as well as across States. Variations in annual figures are often the product of nothing more than changes in reporting practices. For example, special care should be taken in analyzing data subsequent to 1967. When publication of the national prisoner statistics lapsed for 3 years after 1967, data eventually collected for 1968, 1969, and 1970 were less complete and reporting by some States was less rigorous than in previous years."

U. S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973 (1973) at 346 (this warning is quoted from the annual NPS reports). Earlier studies avoided such data aggregation problems by using a cross-sectional analysis of individual states. See, e.g., Chambliss, Types of Deviance and the Effectiveness of Legal Sanctions, 1967 WIS. L. REV. 703, 706; Schuessler, The Deterrent Influence of the Death Penalty, 284 ANNALS 54, 58 (1952); MATTICK, THE UNEXAMINED DEATH 11 (1966); Reckless, The Use of the Death Penalty -- A Factual Statement, 15 CRIME & DELINQ. 43, 44-47 (1969); Sellin, Homicides in Retentionist and Abolitionist States, in SELLIN (ed.), CAPITAL PUNISHMENT 135-138 (1967). Furthermore, because of the mathematical form specified, the Ehrlich model is incapable of utilizing $P_{e|c}$ variables when the variable value equals zero, see pp. 7c-8c infra. Thus, this analysis cannot be focused upon the effect of abolishing and subsequently reintroducing the death penalty in a particular state. Earlier studies analyzed these phenomena and concluded that abolition and reintroduction of the death penalty had no effect on the homicide rate. See, e.g., Cobin, Abolition and Restoration of the Death Penalty in Delaware, in BEDAU (ed.), THE DEATH PENALTY IN AMERICA 359, 373 (rev. ed. 1967); Dann, Abolition and Restoration of the Death Penalty in Oregon, id. at 343, 350; Sellin, Experiments with Abolition, in SELLIN (ed.), CAPITAL PUNISHMENT 122-124 (1967); FATTAH, A STUDY OF THE DETERRENT EFFECT OF CAPITAL PUNISHMENT WITH SPECIAL REFERENCE TO THE CANADIAN SITUATION (Department of the Solicitor General, Canada, Research Centre Report No. 2, 1972) at 55-62; Samuelson, Why Was Capital Punishment Restored in Delaware? 60 J. CRIM. L., CRIM. & POL. SCI. 148, 150-151 (1969).

10/ The assertion that pre-Ehrlich studies "have relied not upon the actual use of the death penalty, but upon its statutory authorization as the independent variable against which the murder rate was compared," (U.S. Br. 36 (emphasis in original)) is simply incorrect. Studies have been conducted of the correlation between homicide rates and lagged execution risk for eleven states over a seventeen year time series, Schuessler, The Deterrent Influence of the Death Penalty, 284 ANNALS 54 (1952); of a similar correlation between homicide rates and execution risk for a fifty year period in Ohio, see OHIO LEGISLATIVE SERVICE COMM'N, STAFF REPORT NO. 46 -- CAPITAL PUNISHMENT (1961); of homicide rates in the weeks before and after well publicized executions, Dann, The Deterrent Effect of Capital Punishment, FRIENDS SOCIAL SERVICE SERIES, Bulletin No. 29 (Third Month) 19 (1935); Savitz, The Deterrent Effect

arbitrary assumptions about the mathematical form of the relationship (e.g., whether the relevant variables combine multiplicatively or additively). One may have confidence in the results only if it can be established ex post that the result is insensitive to an initially arbitrary assumption. Ehrlich's work is, however, completely dependent upon his initial assumption of a particular mathematical form. When the assumption is varied — i.e., when another equally reasonable mathematical form for the regression is substituted — the apparent deterrent effect of execution vanishes. 12/ To put the matter

10/ (cont'd)

of Capital Punishment in Philadelphia, in BEDAU (ed.), THE DEATH PENALTY IN AMERICA 315-322 (rev. ed. 1967); Graves, The Deterrent Effect of Capital Punishment in California, id. at 322-332. And the Government's assertion that all of the available studies of the deterrent effect of capital punishment "have evaluated the effect of the death penalty on the overall murder rate, rather than on the rate of capital murders" (U.S. Br. 36) is similarly mistaken. A recent study has used data that "permit a direct . . . assessment of the relationships between capital homicides and the death penalty." Bailey, Murder and the Death Penalty, 65 J. CRIM. L. & CRIM. 416, 418 (1974). "The findings . . . are . . . consistent with those of earlier investigations of homicide and contrary to the results deterrence theory would predict." Id. at 423. Ehrlich's study does evaluate "the effect of the death penalty on the overall murder rate" (U.S. Br. 36).

11/ For example, a curious result of the form chosen by Ehrlich is that there is a hypothesized constant elasticity relation between the probability of execution given conviction ($P_{e|c}$) and the murder rate throughout the range of the data. In other words, a certain percentage change in the execution rate will effect a fixed percentage change in the murder rate at any level. Nothing justifies such an assumption. (Moreover, any change in the execution rate after a year in which there were no executions is undefinable in percentage terms.)

There also appears to be no justification for some of the relationships assumed. For example, the proportion of 14-24 year-olds in the population, A, might be incorporated in the regression as a squared term rather than as the value itself. This particular specification could be supported by assumption, just as Ehrlich has justified his use of A itself in a multiplicative form; or on grounds that each additional 14-24 year-old added to the population contributes to crime both independently of his contemporaries and in a consortium with them; or by observing that it produces a regression equation that fits the data better.

12/ For a demonstration of the inversion of Ehrlich's results using a similar multiple regression analysis with a different mathematical form, see Passell & Taylor, The Deterrent Effect of Capital Punishment: Another View, Columbia University Discussion Paper 74-7509 (March, 1975) at 6e-7e (appended infra as Appendix E and hereinafter cited as PASSELL & TAYLOR).

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simply, Ehrlich's conclusion is an artifact of his mathematics and proves nothing at all about the real world. His statement that "[t]he regression results are found to be robust with respect to the functional form of the regression equation" (EHRLICH 36) is misleading and erroneous.

In addition, Ehrlich's model is faulty both in its theoretical structure and in the objective variables chosen as substitutes for the hypothesized variables. It is structured in such a way that the inevitable errors in data gathering over long periods of time will artificially produce a negative correlation between the critical independent variable $P_{e|c}$ and the murder rate.[13] It cannot cope with years in which there are no executions (and in which $P_{e|c}$ would thus equal zero) because the logarithm of zero cannot be taken. Ehrlich deals with this problem by another arbitrary assumption. Although the actual number of executions in the years 1968, 1969, and 1970 was zero, he assumes that it was one. But because his mathematical form requires only that the coefficient of $P_{e|c}$ in these years not equal zero, a better approximation of reality in this time period would have been to assume that the number of executions was a fraction very close to zero. Such an assumption, unhappily for Ehrlich, would defeat his estimation and utterly destroy his demonstration of a deterrent effect stemming from executions; so he chooses not to

13/ The key variable, $P_{e|c}$, is measured in such a way as to induce an artificial inverse relationship with the murder rate. In a footnote (EHRLICH F8 n.23), Ehrlich indicates that the denominator of this variable is measured as

$$c \equiv Q^{\circ} \cdot P^{\circ}_{a} \cdot P^{\circ}_{c|a} \cdot$$

Since the numerator of his dependent variable, the murder rate, is Q°, and since Q° is contained in the denominator of his independent variable $P_{e|c}$, it follows that measurement error (in any direction) in Q° would bias his key coefficient negatively. So if, for example, some crimes that were classified as "homicides" in one year would have shown up as "manslaughters" or "suicides" or "missing persons" if they occurred in another year, for whatever reasons (see note 9 supra), then Ehrlich's model will have found some degree of systematic negative relationship between the murder rate and the conditional execution probability due to this measurement error.

make it. Similarly, when he substitutes objectively measurable factors for his hypothesized variables,[14] the substitution is frequently arbitrarily made.[15]

Finally, the precise mathematical estimates of the deterrent effect of capital punishment generated by the Ehrlich model are unacceptable because of his failure to identify data sources, to justify data manipulations, and to employ reliable statistical procedures.[16] The sources of the data used in his paper are not identified, making it extremely difficult to replicate the results described in the paper[17] or to check the correctness of the data

14/ Indeed, the theoretical justification for substituting the three objective deterrence variables is itself open to question. Such substitution entails, for example, the assumptions that the individual potential killer in Maine is deterred by knowledge of an execution in Georgia, and that the clearance rate for murder in California affects the expectation of apprehension of the potential murderer in Alabama.

15/ For example, the same pages of the UCR data from which Ehrlich presumably obtained his clearance rate statistics (which are used as an objective measure of the probability of arrest) show a separate figure for arrests. Ehrlich provides no justification for his choice of clearance rate as an objective surrogate for P_a: he neither tests both surrogates nor theoretically justifies his preference. To be sure, clearance rates include crimes which are committed by more than one person and therefore may represent, better than arrest rates, the likelihood of being apprehended for a crime; but clearance rates also include a considerable number of confessions by persons in custody for other crimes (as well as murder-suicide episodes) and are, in this way, less suitable than arrest statistics in demonstrating the probability of apprehension for a crime.

16/ Ehrlich fails to report readily available tests that show how well the functional form of the regression equation he uses fits the data in comparison with other standard functional forms. For examples of such tests, see DRAPER & SMITH, APPLIED REGRESSION ANALYSIS 163-216 (1966).

17/ The procedures by which Passell & Taylor generated data similar to those used by Ehrlich are described infra. PASSELL & TAYLOR 14e . The discrepancies which appear when even slightly different data are used attest to the extreme instability of the model. Id. at 3e .

and computations used.[18] Derivation of the results is further clouded by frequent reliance on obscure (rather than publicly available) data sources[19] and by generation of non-empirical data by undescribed interpolation methods.[20]

18/ The obscuring of data sources and the frequent failure to describe computations makes it difficult to check the correctness of the mathematical calculations in the manuscript. A number of clear errors occur, however. Table 3 (which provides a rare opportunity to check Ehrlich's computations) contains at least two errors: the natural logarithms of the means for the $P_{e|c}$ and U variables are incorrectly calculated. A central finding of an earlier Ehrlich study (of the deterrent effect of expenditures for police) was revised between successive published versions, compare Ehrlich, Participation in Illegitimate Activities: A Theoretical and Empirical Investigation, 81 J. POL. ECON. 521 (1973) with Ehrlich, Participation in Illegitimate Activities: An Economic Review, in BECKER & LANDES (ed.), ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 68 (1974), because a dichotomous variable representing Southern states (an incidental variable used primarily for the purpose of statistical control) was improperly weighted. This produced a revision from -3.04 percent to -1.42 percent in Ehrlich's estimated effect on the crime rate of a one percent increase in police spending.

19/ See, e.g., note 25 EHRLICH F9 n.25: "I am indebted to Edi Karni for making available to me his calculations of Y_p."

20/ See, e.g., EHRLICH Table 3, note a: "The figures for $P^{\circ}_{c|a}$ (1933-1935) and XPOL (all the odd years 1933-1951) were interpolated via an auxiliary regression analysis."

2. Incorrect Assumptions Concerning the Stability of Causation of Homicides Over Time

Any statistical inference about deterrence from Ehrlich's regression analysis depends upon the assumption of temporal homogeneity -- i.e., that the exact mathematical relationship among Ehrlich's eight independent variables and the murder rate remained constant over the entire measurement period 1935-1969. This is only one of several curious assumptions of homogeneity that are concealed in Ehrlich's basic equation. See, e.g., notes 9, 10, 11, supra. The equation is akin to assuming, for example, that an increase in highway speed will have an identical quantitative effect (in percentage terms) on traffic accidents whether the increase is made from five miles per hour to ten miles per hour or from fifty miles per hour to one hundred miles per hour -- whether it occurs in New York or New Mexico -- whether it occurs under the traffic conditions of 1935 or 1969 -- etc. In Ehrlich's case, most of these kinds of assumptions are both questionable and unverifiable in terms of his data; but his assumption of temporal homogeneity is verifiable, and it is wrong. A separate statistical test of temporal homogeneity reveals that, for the estimation period 1935-1962, no deterrent effect such as Ehrlich finds for 1935-1969 is discernible. During the 1935-1962 period, in fact, the effect of capital punishment in Ehrlich's model, was to encourage rather than to deter murder.[21] We should make clear that this does not mean Ehrlich has shown a deterrent effect for one period but not for the other. Rather, it means that because of an erroneous assumption of homogeneity among included periods, Ehrlich has shown nothing at all. His assertion that "the qualitative results reported in Table 4 are insensitive to changes

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21/ See PASSELL & TAYLOR, infra, at 4e-6e.

in the specific interval of time investigated in the regression analysis, as indicated by the results reported in Table 7" (EHRLICH 37) is in error.

Thus (as Ehrlich himself hints in a footnote (EHRLICH F10, n.28)), the entire burden of his conclusions regarding the deterrent effect of capital punishment rests on the time period 1963-1969. Of course, executions fell from few to none during the 1960's and murders rose during this period. But crime in general rose during the 1960's -- far more sharply than did murders[22/] -- so that Ehrlich's results reflect nothing more or less than an observation of the general crime trend of the sixties which conveniently ignores both the steep climb of other crimes relative to murder and the numerous factors relevant to the rise of all crime in 1963-1969.[23/] During this period, for example, the number of hand guns in the possession of the public skyrocketed, racial friction escalated, expectations about the abolition of poverty were raised and dashed, juvenile delinquency

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22/ See footnote 30 to the text of this reply brief, p. 18, supra.

23/ Ehrlich fails to correct his 1960's murder statistics for this general crime rise. While it may be impossible to isolate all of the factors which led to the general increase in crime, it would be possible to adjust the murder rate for these years to compensate for conditions which were causing a general crime rise. Furthermore, Ehrlich has failed to include as a control variable in this study a variable, income dispersion, which he earlier posited to have a significant relation to the crime rate, even though he attempts to explain variation in precisely the same dependent variable (the murder rate) in both studies. See Ehrlich, Participation in Illegitimate Activities: An Economic Review in BECKER & LANDES, ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 68-134 (1974). In the earlier study, id. at 101, Ehrlich incorporated a measure of income dispersion as a factor to be taken into account in his regression equation analyzing the effects of changes in the probability and length of incarceration on the murder rate. For reasons that are unclear, he does not use this as a control variable in his capital punishment study, despite the fact that the United States Census Bureau keeps data on the distribution of income throughout the country in time series. See, e.g., UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: CONSUMER INCOME, Series P-60, No. 97 (1975).

increased, the abuse of narcotic drugs increased, and economic crime (robbery, burglary) multiplied. All of these variables have dimensions which are objectively measurable, yet all are excluded from Ehrlich's analysis.[24/] Under the arbitrary and inflexible Ehrlich model, the contribution of all these variables to the murder rate rise is unknowable, and even the most tentative assertion that the decline in executions during 1963-1969 was responsible for this rise is by ipse dixit rather than statistical demonstration.[25/]

Furthermore, although Ehrlich made an earlier study of non-capital crimes which concluded that the length of prison sentence

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24/ An earlier Ehrlich econometric study, Ehrlich (1974), note 23, supra, found an apparent deterrent effect on the crime rate based on both the probability and severity of punishment. However, a replication of this study, using data from a later period, which included variables reflecting population density, population migration, and broken family rates, demonstrated that the apparent deterrent effect disappears under a model that incorporates a larger set of explanatory variables. Forst, Participation in Illegitimate Activities: Further Empirical Findings, 2 POLICY ANALYSIS (No. 3) (Univ. of Cal. Press) (to be published Summer, 1976).

25/ Ehrlich recognizes the critical importance of the years 1962-1969 to the results he demonstrates (EHRLICH F10 n.28) but asserts that this interval is "particularly important . . . because of the greater variability exhibited in this sub-period by P_a, $P_{c|a}$, $P_{e|c}$." Ibid. In view of the failure to control for other variables affecting the homicide rate during the 1960's the assertion is utterly groundless.

is an important deterrent,[26] his present capital punishment study fails to control for variations in the length of prison sentences imposed upon convicted murderers who were not sentenced to death. Rather, Ehrlich arbitrarily (and incredibly) assumes that alternative sentences for homicides were constant during the period he surveyed. EHRLICH 43-44. Given Ehrlich's own theory of the deterrent efficacy of punishments generally, it is obvious that the rise in the homicide rate during the 1960's -- critical to Ehrlich's ultimate conclusion -- might be more than adequately explained by the decline in length of prison sentences imposed for homicide during this period.[27] But even this is not the full measure of the deficiency of Ehrlich's model arising from his failure to consider other punishments than death. The plain fact is that Ehrlich does not purport to address the only deterrence question that is relevant to a choice between capital punishment and other criminal penalties: their relative deterrent effect. Ehrlich attempts to predict the differential effect of increasing the number of executions during the 1935-1969 period, but he nowhere attempts to compare the effect of the imposition of life imprisonment on the homicide rate to the effect of the imposition of the death penalty (e.g., by comparing the coefficient of $P_{LI|c}$ to that of $P_{e|c}$).

26/ EHRLICH (1974), note 23, supra.

27/ Data from the 33 States that reported both in 1960 and in 1970 indicates that the mean length of prison sentence appears to have declined during this period. In 1960, 46.8% of prisoners released who had been convicted of homicide had served at least five years; in 1970, only 35.8% of this group had served this long a term. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS: PRISONERS RELEASED FROM STATE AND FEDERAL INSTITUTIONS 1960 (undated) at 23-70; UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, STATE PRISONERS: ADMISSIONS AND RELEASES 1970 (undated) at 47-81.

3. Interdependence of "Independent" Variables

The theoretical portion of Ehrlich's paper acknowledges that the interrelations between society, the judicial system and the behavior of murderers are complex. Potential murderers are assumed to respond to incentives -- the probability of punishment, the severity of punishment, etc. -- but the incentive structure itself is simultaneously determined by the number of murders taking place. Thus, while punishments affect murder rates, murder rates also affect punishments. Moreover, the variables that influence murderers in Ehrlich's model are themselves interrelated: the probability of jury conviction for murder (a possible deterrent) is not unrelated to the probability of execution given conviction (another possible deterrent). Measuring the deterrent effect of executions on murders while holding all other variables constant is impossible; all other variables cannot be held constant because of their interrelationship.[28]

The problem here is that a single equation does not get to the root of the relevant relationship (the net impact of executions upon murders in the United States). It is perhaps made clearest by analogy. If one ignores relationships in the way that Ehrlich does, it might be possible to demonstrate statistically that a team of midgets will win the American League Pennant because -- holding constant batting, fielding, pitching, and base-running -- midgets have a smaller strike zone than normal players, and will therefore draw more walks and consequently score more runs. The force of the statistical demonstration

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28/ For a more detailed discussion of these problems, see PASSELL & TAYLOR, infra, at 7e-10e.

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is powerful until one considers whether a team of midgets really can bat, field, pitch, and run bases like the Oakland A's. Ehrlich's own inadequate appreciation of the problem of interrelationship among the variables determining murder rates is peculiarly damaging to his conclusion because, under his theoretical model, convictions have a stronger deterrent effect on murder than do executions.[29/] Therefore, if it is the case -- as knowledgeable observers have repeatedly asserted (see references cited in Pet. Br. 90 n.13) -- that the probability of execution-given-conviction decreases the probability of conviction, Ehrlich's model suggests that capital punishment will actually increase the rate of murders. We say "suggests" because the model with its manifold defects is as incapable of demonstrating this conclusion as it is of demonstrating anything else.

29/ Ehrlich explicitly posits that the probability of conviction has a greater deterrent effect than the probability of execution: "A fortiori, a one percent increase in $P_{c|a}$ is expected to have a greater deterrent effect than a one percent increase in $P_{e|c}$ as long as $P_{e|c}$ is less than unity." EHRLICH 10. The elasticity coefficients derived for $P_{a|c}$ are consistently stronger than those derived for $P_{e|c}$. See also EHRLICH 9-11, 20, 34, 46.

The Ehrlich manuscript is, then, so deeply flawed that it neither adds to our knowledge concerning the deterrent efficacy of criminal punishment nor calls into question the previous studies of the deterrent effect of the death penalty. Among other defects: (1) The result is completely dependent upon arbitrary assumptions regarding the mathematical form of relationships among variables; equations based upon alternate assumptions produce opposite results. (2) An opposite result is obtained by similar analysis of the period 1935-1962; the Ehrlich result is therefore dependent upon the assumption that the increase in murder rates during the 1960's was determined by the simultaneous decrease in execution rates rather than by the factors which the Ehrlich equation fails to control and which are known to have contributed to a general increase in crime rates over that period. (3) The Ehrlich analysis ignores the interdependence of relevant variables: most notably the probability (based upon the most consistent observation of modern use of the death penalty -- the phenomenon of jury nullification) that a significant increase in execution rate will result in a decrease in conviction rate. Yet, the decrease in conviction rate should, by Ehrlich's own analysis, increase murder rates sufficiently to offset any deterrent value of execution. The precision of Ehrlich's announced results, in the face of the data limitations and the theoretical problems involved in accurately isolating and quantifying the factors which influence the murder rate, is utterly delusory and constitutes a serious distortion of the proper

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uses of linear regression analysis. The fact that the conclusions of the Ehrlich study stand so starkly alone, in contradiction to over half a century of research, see Pet. Br. App. E. at le-10e, is itself a significant indication of the study's abandonment of scientific method to cybernetic technology:

> "no scientist should be persuaded to abandon his scientific insight and principles in favor of some computerized statistical screening procedure. The use of multiple regression techniques is a powerful tool only if it is applied with intelligence and caution." 30/

30/ DRAPER & SMITH, APPLIED REGRESSION ANALYSIS (1966) 242.

APPENDIX D

March 27, 1975, letter from National Bureau of Economic Research, Inc., President John R. Meyer to Counsel for Petitioner.

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March 27, 1975

Mr. David E. Kendall
NAACP Legal Defense and Educational Fund, Inc.
10 Columbus Circle
New York, N.Y. 10019

Dear Mr. Kendall:

This is in reply to the questions contained in your letter of March 17.

1. Has this report been oficially approved in any way by the NBER?

Answer: The working paper in question has not been approved for National Bureau publication nor has it been submitted for approval.

2. Was this report previously available to interested members of the general public?

Answer: It was not available to interested members of the public. A very limited number was circulated to interested scholars.

3. What is the nature of the "informal" distribution of NBER working papers?

Answer: NBER policy concerning the reproduction and distribution of working papers is outlined in two memoranda by Robert T. Michael, Assistant Vice President, dated June 20, 1973. Copies of these memoranda are enclosed.

4. What is the nature of the review process accorded official NBER publications?

Answer: The policies and procedures governing NBER review of publications are described in the front of each official NBER publication. I enclose a copy of this as well.

5. What is the relationship between the November, 1973, Ehrlich paper and the paper which NBER will publish in June 1975?

Answer: The NBER will not be publishing a paper on this subject in June 1975 nor is it considering publication at this time. Professor Ehrlich is

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publishing a much reduced version of the working paper in the American Economic Review in June 1975. This paper is not an official NBER publication and this fact will be clearly stated. Professor Ehrlich is now working on an extension of his research making use of cross-state comparisons. It is possible that this newer work may be combined with some of his previous work and, if review by the staff leads to that recommendation, might be submitted for official NBER review at some later time.

I hope these answers are sufficiently responsive. If additional information is required, please contact us.

Sincerely yours,

John R. Meyer

JRM:jh

[NOTE: the documents referred to in #3 and #4 of this letter, and appended to it, have been omitted because they do not appear presently relevant.]

APPENDIX E

Peter Passell & John B. Taylor, Columbia University Discussion Paper 74-7509 (March, 1975), The Deterrent Effect of Capital Punishment: Another View

Introduction

In a recent paper Isaac Ehrlich (1975) has discovered a negative relationship between the use of the death penalty and homicide rates in the United States over the last four decades. This empirical finding takes on special meaning because (a) it is the first test of the capital punishment deterrence hypothesis to use simultaneous equation estimation techniques; (b) its publication comes at a time when state legislatures and the courts are reshaping policy on the imposition of the death penalty. Hence the importance of a second look at Ehrlich's result.

Such a re-examination, described below, shows that the time series model and data used by Ehrlich permit no inference whatsoever about the deterrent effect of capital punishment. His findings are extremely sensitive to essentially arbitrary choices of model specification and to the period over which the model is estimated. Moreover, estimation of a single structural equation sharply limits the policy implications of the estimated coefficients.

Section I describes the replication of Ehrlich's murder rate function, Section II tests the model for temporal homogeneity, and Section III examines its sensitivity to changes in functional form. Finally, Section IV examines the pitfalls of inferring an execution-murder trade-off from a single equation.

I. Model Replication

A representative sample of the empirical results reported by Ehrlich in support of the deterrence effect of capital punishment is his equation 1, Table 4 which is displayed as our equation (a), Table A; we use the same notation as Ehrlich. In this regression

equation the logarithm of the U.S. annual murder rate $(Q/N)^{o}$ is explained by the logarithm of three deterrence variables (the clearance rate for murder (P^{o}_{a}), the conviction rate for murder ($p^{o}_{c/a}$), and the execution rate for murder lagged one year $(PXQ_1)_{-1}$) as well as by the logarithm of five other explanatory variables (the labor force participation rate (L), the fraction of the population between 14 and 24 years of age (A), permanent real per capita income (Y_p), the unemployment rate (U), and an exponential time trend (e^{T})). The equation is estimated by a two-stage procedure in which P^{o}_{a} and $P^{o}_{c/a}$ are treated as endogenous variables, and are first regressed on current and lagged values of the predetermined variables, lagged values of all the endogenous variables, and a group of otherwise excluded exogenous variables (real police expenditure per capita (XPOL), real government expenditure per capita (XGOV), and the fraction of nonwhites in the population (NW)). In the second stage an iterative procedure is used to estimate the first order serial correlation coefficient along with the coefficients of the endogenous and predetermined variables.

For the purpose of this paper the important estimated coefficient of equation (a) is that of $(PXQ_1)_{-1}$ which is negative and significant. It is such an estimate which Ehrlich uses to calculate that one additional execution per year may result in as many as 17 fewer murders.

Ehrlich presents several variations on this same model (Ehrlich, Tables 3 and 4), among which the major differences are the use of alternatives to $(PXQ_1)_{-1}$ as empirical surrogates for $P_{e/c}$, the subjective conditional probability of execution given conviction.[1] Neither prior judgment nor the estimated coefficients provide much basis for choosing among the alternative forms. We

chose to concentrate our research on the form represented by equation (a), because it is the most common in Ehrlich's tables and permits convenient comparisons with the tradeoffs computed by Ehrlich.

Equation (b) of Table A shows one attempt to replicate equation (a) using the same iterative procedure to estimate the first-order serial correlation coefficient p in the second stage. Explicit definitions and sources for all variables used in this replication are found in the Appendix. Note that many of the estimated coefficients and t-ratios in equation (b) are substantially different than in equation (a). In particular, the estimated coefficient of $(PXQ_1)_{-1}$ is not statistically significant[2] in equation (b).

This discrepancy can be ascribed either to seemingly minor differences in the data or to unspecified procedures for creating variables or estimating missing observations. Since Ehrlich does not specify such procedures it is impossible to exactly duplicate his results (the apparent sensitivity of the Ehrlich results to minor data variations is, however, striking).[3] Our permanent income series is different because Ehrlich's method of calculation is not stated. Further, our labor force participation series[4] is different, as are the missing observations on police expenditure which Ehrlich estimates by an unspecified interpolation or smoothing procedure. Probably more important, however, is the 1933-35 data on conviction rates not collected by the UCR and estimated by Ehrlich using an unspecified auxiliary regression which could not be duplicated. Instead we used an alternative data source, the Judicial Criminal Statistics estimates of percent of persons found guilty as charged for murder.[5]

It is quite likely that this pre UCR data discrepancy is the reason for the major discrepancy between our estimate of p and Ehrlich's. Therefore, we re-estimated the equation constraining p to be .059 in equation (c). These estimates are closer to Ehrlich's, particularly with regard to the significance of the three deterrent variables.

In order to minimize the effect of the 1933-35 data,[6] we truncated these years from the sample. The results of this estimation are found in equation (d) and are quite similar to Ehrlich's. In particular the coefficient of $(PXQ_1)_{-1}$ is significant and the coefficients of $\hat{p}^o_a$ and $\hat{p}^o_{c/a}$ have the same relative values found by Ehrlich.[7] Confidence in the comparability of equation (d) with (a) is reinforced by the similarity between our estimate with an additional three years truncated (equation(e)) and Ehrlich's estimate over the same period (see his equation 6, Table 4). In any case for the sensitivity analysis of the following Sections, equation (d) will be taken to represent Ehrlich's model and empirical findings.[8]

II. Temporal Homogeneity

Behind the use of time series estimation is the assumption that the structure and the coefficients to be estimated remain stable over the sample period. In Ehrlich's case it is assumed that the behavior of potential murderers is governed by the same variables with the same coefficients over the period 1938-1969. If this assumption is in fact not correct, the estimated function would have little use either as an explanation of the causes of murder or of the policy implications of changing the value of an exogenous variable in the structure.

The assumption can be tested. Consider for example the hypothesis that the murder rate function estimated in equation (d) has the same structure from 1938-1962 as from 1963-1969. Equation (f) Table B with the time series truncated at 1962 was estimated to test this hypothesis. The F - ratio, computed from the sums of squared residuals in equations (d) and (f) was 4.715, significant even at the 99% level. Thus the hypothesis of structural homogeneity must be rejected. Further, there is nothing special about the sample periods chosen for this test.[9] Similar tests were computed for the four possible structural shift points from 1961-1964; the F - ratio indicates a significant shift for each of these periods. It is clear therefore that Ehrlich's equation has been estimated over different regimes, a fact which vitiates the validity of his estimates.

Since our primary interest is in the deterrent effect of capital punishment, it is important to note that the coefficient of $(PXQ_1)_{-1}$ is very different in equations (d) and (f): turning from negative and significant to positive and insignificant when the sample period is changed. The F-test for the entire equation does not, however, rigorously exclude the possibility that changes other than changes in the coefficient of $(PXQ_1)_{-1}$ have generated the statistical significance.

Equations (g) and (h) in Table B provide a test of the hypothesis that the coefficient of $(PXQ_1)_{-1}$ is the same over two sample periods under two different sets of assumptions. In equation (g) we add a variable, P63, equal to zero in the years 1938-1962 and to $(PXQ_1)_{-1}$ in the years 1963-69. The t-ratio of this variable gives a test of this homogeneity hypothesis, given that all other coefficients are the same over the two periods. The

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value of the statistic indicates rejection of the hypothesis at the 95% level. To equation (h) we add another variable, C63, equal to 0 from 1938-62 and to 1 from 1963-69. The t-ratio of P63 in this equation gives a test of the hypothesis of homogeneity of the coefficient of $(PXQ_1)_{-1}$, given that all variables except the intercept are stable over the two periods. The value of this statistic also indicates rejection of homogeneity.

III. Specification Sensitivity

Theory suggests that an econometric structure should be specified in the mathematical form which conforms most closely to behavioral expectations. In practice, forms are usually chosen which are linear in the parameters to make it possible to interpret the statistical properties of the estimators. And commonly, the logarithmic form is chosen to facilitate interpretation of the linear parameter estimates as partial elasticities. In this latter case, the procedure is often justified ex ante on economic grounds -- relationships are expected to exhibit constant elasticities in the relevant range; or, ex post -- the log-linear form is more consistent with the data than alternative forms.

In the case of Ehrlich's choice of the log-linear form, neither justification is convincing. While the elasticity of murder rates with respect to the conditional probability of execution might be approximately constant over some range of the variables, we see no reason why this constant elasticity should hold over the very large range in the observed time series. In fact such an assumption is absurd when the estimated probability of execution drops to zero beginning in 1968. Ehrlich artificially avoids this absurdity by assuming that the number of executions is

equal to one in years when it is actually zero.[10]

The two equations in Table C examine two different functional forms for the murder rate regression. Equation (i) is a linear rather than a log-linear form. It is striking that all the estimated coefficients in the linear form have the same sign as in the log-linear form, except for one: the estimated probability of execution, which is perversely positive though not significant, rather than negative and significant. Therefore Ehrlich's discovery of of a deterrent effect of capital punishment depends on a choice of functional form that is utterly arbitrary. This extreme sensitivity of the capital punishment deterrent result to functional form is further emphasized by equation (j) in which all variables except $(PXQ_1)_{-1}$ are in the log form. Again the coefficient of the execution variable is radically different than Ehrlich's equation.[11]

This sensitivity can be explained intuitively by Figure 1, which shows plots of PXQ_1 and the log of PXQ_1 over time. The radically different time shape coupled with the fact that the log is approximately linear over the range of the other variables (in particular the murder rate shown in Figure 2), implies the two forms will generate vastly different results.

IV. Interpretation of the Ehrlich Time Series Regressions

In this Section we abstract from the criticism of Sections II and III to examine another aspect of the analysis. Given that Ehrlich has correctly estimated the murder rate function, is it reasonable to infer a murder-execution tradeoff from the negative coefficient of $P^O_{e/c}$?

Ehrlich argues that this estimated coefficient $(\hat{a}_3)$ should be interpreted as an estimate of the partial elasticity of murder rates with respect to the risk of execution. Thus he is able to

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TABLE C. Specification Sensitivity

Equation	Constant	$\hat{P}^0_a$	$\hat{P}^0_{c/a}$	$(PXQ_1)_{-1}$	L	A	Y_p	U	T
(i) 1938-69	.194	-.406(-3)	-.595(-3)	.134(-2)	-.173	.133	.643(-4)	.629(-3)	-.205(-2)
R^2 = .941	(3.26)	(-0.81)	(-2.25)	(1.04)	(-2.16)	(1.78)	(3.26)	(1.40)	(-2.97)
SSR = .113(-3)									
$\hat{\rho}$ = .578									
(j) 1938-69	-5.411	-1.323	-0.435	0.012	-0.935	0.526	1.641	0.062	+0.032
R^2 = .936	(-0.81)	(-1.79)	(-2.40)	(0.55)	(-1.10)	(2.11)	(2.36)	(1.41)	(2.24)
SSR = .039									
$\hat{\rho}$ = .690									

Equation (i) is linear in all the variables, while equation (j) is log-linear in all the variables except $(PXQ_1)_{-1}$ and T which enter linearly. The method of estimation and notation is the same as in Table A. The integers in parenthesis next to the estimated coefficients in equation (i) indicate multiplication by that power of ten.

FIGURE 1

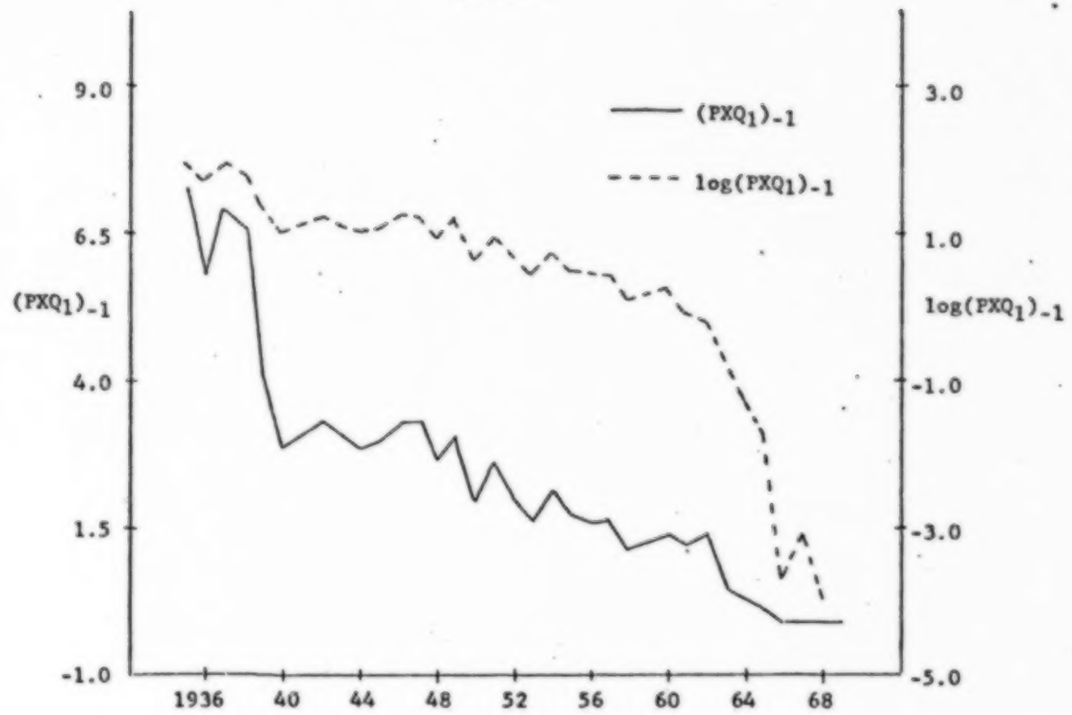
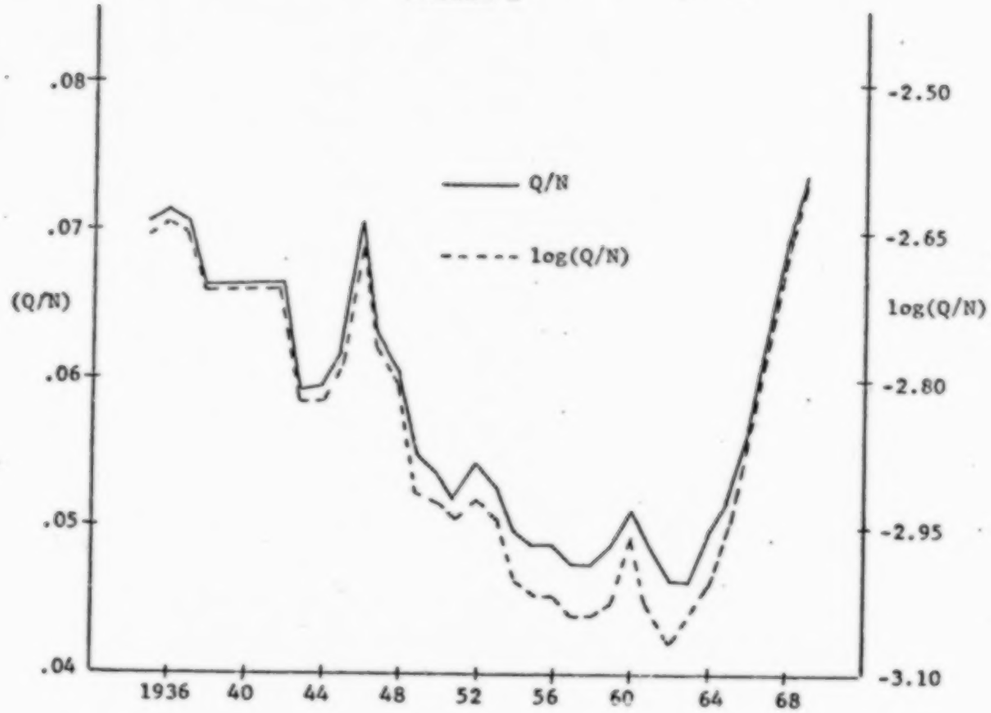


FIGURE 2



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derive the estimated marginal tradeoff between executions and murders: $\Delta Q/\Delta E = \hat{\vartheta}_3 (Q/E)$. If one assumes $\hat{\vartheta}_3 = -.065$ and Q and E equal to the time series mean values, $\Delta Q/\Delta E = -7.7$. For Q = 10,920 and E = 41, $\Delta Q/\Delta E = -17.3$.

It is important to note, however, that behind this interpretation of $\hat{\vartheta}_3$ lie several assumptions. The estimated murder supply function may be written as

$$\log (Q/N) = \hat{\vartheta}_1 \log (AR/Q) + \hat{\vartheta}_3 \log (E/C) + \ldots,$$

where AR = murders cleared through arrest, and C = convictions for murder. Note that the number of murders (Q) appears on both sides of the equation. Collecting terms and solving for log Q in terms of log E results in

$$\log Q = \hat{\vartheta}_3/(1 + \hat{\vartheta}_1) \log E + \ldots$$

Since $\hat{\vartheta}_3 < 0$ and $\hat{\vartheta}_1 < -1$, the elasticity of Q with respect to E appears to be positive! The logical root of this puzzle is not difficult to find. Ehrlich's calculation is implicitly based on the assumption that a hypothetical increase in executions will change AR by precisely the right amount such that

$$\hat{\vartheta}_1 \Delta \log (AR/Q) = 0$$

Our calculation is made with another assumption, i.e., that the number of crimes cleared through arrest would be unaffected by a change in E.

Presumably neither assumption is correct. We do not know what determines clearance rates for murder, but it is completely arbitrary to assume either adjustment in lieu of more information.

This near paradox suggests a more fundamental problem with the Ehrlich analysis. Social scientists interested in economic models of crime explicitly acknowledge the simultaneity of the system -- hence the logic of calling criminal behavior functions

supply functions. Ehrlich has met the technical requirements for econometric identification in his single estimated equation, but has left important questions about the operational meaning of what might be casually construed to be exogenous policy variables.

For example, consider the relationship between the conditional probability of conviction given arrest ($P_{c/a}$) and the conditional probability of execution given conviction ($P_{e/c}$). In order to interpret $\hat{\vartheta}_3$ as an elasticity, one must assume that conviction rates will be unaffected by exogenous changes in ($P_{e/c}$) -- presumably legal institutional changes affecting jury discretion in capital offense cases. Yet many legal experts and social scientists believe that increases in ($P_{e/c}$) will reduce ($P_{c/a}$), since juries and judges will apply stricter standards for convictions when there is a greater prospect of execution.[12] This widely accepted hypothesis was used successfully as an argument by 19th and early 20th century legal reform movement leaders bent on abolishing whole categories of capital crimes and granting juries greater discretion in penalties imposed.[13] By Ehrlich's estimated equation (3) in Table 3, if the absolute value of the elasticity of ($P_{c/a}$) with respect to ($P_{e/c}$), (ϵ_{ce}), were greater than .174, the net impact of an increase in execution probabilities would, perversely, raise murder rates. More generally, the impact will be perverse if $|\epsilon_{ce}| > \vartheta_3/\vartheta_2$. And, of course, all this ignores other possible relationships between variables on the right hand side of the supply equation.

This is not an uncommon problem in policy-oriented econometrics, where the focus is on predicting the implications of a policy rather than on correctly estimating individual equations in a structure. If the purpose of the investigation is to estimate the

impact of a change in an exogenous policy instrument, executions per conviction, then the relevant coefficient is the coefficient of the execution per conviction variable in the reduced form equation of the entire system.

Ehrlich acknowledges this point of methodology, and in fact estimates a "modified reduced form", achieving significantly negative estimates of q_3 for three of his four alternative estimators of $P_{e/c}$. One might note, however, that for the period 1938-1962 (using all the exogenous variables specified by Ehrlich), the estimated coefficient of log $(PXQ_1)_{-1}$ is insignificant; further, a similar equation using $(PXQ_1)_{-1}$ rather than log $(PXQ_1)_{-1}$ over the full sample 1938-69 also shows an insignificant estimated coefficient. We would place little weight on either Ehrlich's reduced form estimation or our own variant, since we have no faith that the variables chosen by Ehrlich represent the exogenous variables in the actual structure. On precisely these grounds, Ehrlich refrains from attempting to estimate the rest of the structural equations implied by his theory of crime and law enforcement.

Conclusion

This examination of Ehrlich's estimates has limited focus. One might wish to examine further the theoretical basis for including or excluding variables in the model, the relevance of the specific estimators chosen to test the hypothesis about capital punishment deterrence, the quality of the data (particularly for the deterrence variables P_a^o, $P_{c/a}^o$, $P_{e/c}^o$) used in the test, and the aggregation problems imposed by the use of national data.

We have essentially confined ourselves to a narrower analysis. First, we have shown that the estimates are extremely sensitive to

the time period chosen and to the mathematical form of the specification. This sensitivity raises grave (and in our own opinion, overwhelming) doubt about the utility of Ehrlich's time series estimates. Second, we have argued that even if Ehrlich has captured the essence of the murder rate function in his regression, it is not possible to infer from it that a change in legal institutions which increased $P_{e/c}$ would reduce murder rates.

In sum, on the basis of Ehrlich's research, it is prudent neither to accept nor reject the hypothesis that capital punishment deters murder. This, of course, does not mean that economic models and statistical inference have no role to play in diminishing our ignorance in this area. Answers, however, must await superior data which allows more conclusive hypothesis-testing.

Footnotes

* The authors would like to thank Phoebus Dhrymes, David Kennett, and Jacob Mincer for their comments and assistance.

1. Another difference is that civilian population (N) is used as an additional explanatory variable in the first stage of the regressions reported in Table 3 though there is no mention as to why this was done. Since more results are reported in Table 4, we focus on the form used in that table.

2. All tests of significance in this paper and in Ehrlich's are based on asymptotic distribution assumptions. Thus what are conventionally called t - ratios or F - ratios in the classical linear regression model will only approximately have the appropriate t or F distribution in these models.

3. The apparent sensitivity of Ehrlich's result to minor data variations is in itself disturbing. While we would not place great weight here on the significance of this sensitivity, we would nonetheless defend our estimation procedure and data set as being an accurate representation of Ehrlich's model. See the Appendix for a detailed description of how our variables are defined and the data sources used.

4. Ehrlich defines the labor force participation rate as the percentage of the noninstitutional population, 16 years of age and over, in the labor force throughout the sample period. In our series, for years prior to 1947, the base population includes persons 14 years and older. This distinction corresponds with unemployment rate series used by Ehrlich.

5. This alternative series excludes non-negligent manslaughter and is therefore a different estimate of the true conviction rate for capital offenses than observations based on the UCR data. We would, however, place as much confidence in these measures as in a presample extrapolation using the series beginning in 1936.

6. It should be noted that any error in measuring conviction rates is compounded in errors in the executions per conviction series, which requires an estimate of convictions based on conviction rates. See point 4 of the Appendix.

7. Ehrlich places great importance on the relative effect of these three probabilities as support for his theoretical analysis. The null hypothesis, that these coefficients are equal to each other, is not tested however.

8. We also estimated all equations using ordinary least squares with and without the serial correlation adjustments, since the benefit of using Ehrlich's two stage procedures is unequivocal only in large samples. We found the estimates do vary depending on the method used. However, in order to focus on more substantive criticism of Ehrlich's results, we use the same estimation procedure throughout this paper.

9. These values are 9.925, 3.899, and 3.593 for the samples ending in 1961, 1963 and 1964, respectively. The estimated coefficient for $(PXQ_1)_{-1}$ is positive in all samples, though only significant in the 1938-1961 sample, where coefficient is .1141 with a t - ratio of 3.251.

10. In replicating Ehrlich's model we also use this procedure. This approach implies that the variable representing probability of execution is actually the inverse of the number of convictions in those years. Even if Ehrlich drops these points from his sample he is still faced with the problem of post-sample prediction.

11. We might note that we did not need to experiment with numerous functional forms to detect this sensitivity.

12. See, for example, Vidmar (1972), Bedau (1967), Bennett (1958), Kalven and Zeisel (1966), Zeisel (1968), Knowlton (1953).

13. See, for example, Shipley (1909), and McCloskey (1973).

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APPENDIX: DATA SOURCES

This appendix gives sources for all data used in estimating the above equations as well as describing procedures for creating variables from the raw data and for estimating missing observations. Since Ehrlich (1975) does not provide such information, it is not possible to replicate his results exactly. However, it should be clear from examining this appendix that our choice of data and procedures conform to the descriptions of Ehrlich (1975). Units of measurement are also chosen to correspond, though in the log-linear regressions only the intercept will be affected by such choices.

VARIABLES:

1. Murder Rate, $(Q/N)^{o} = M/N$, where
   M = Number of murders and non-negligent manslaughters per year
   1933-69, Revised series provided by the Uniform Crime Reporting Section of the U.S. Federal Bureau of Investigation,
   N = Civilian population in 1000's,
   1933-57, HS, Series A3,
   1958-69, CPR, P-25, No. 442.

2. Clearance Rate for Murder, P^{o}_{a}, percentage of murders and nonnegligent manslaughter cleared by arrest,
   1933-69, UCR, Annual Bulletin.

3. Conviction Rate for Murder, $P^{o}_{c/a}$, percentage of persons found guilty as charged for murder and nonnegligent manslaughter,
   1936-69, UCR, where two estimates are presented the estimate based on the larger sample was chosen; 1961 was interpolated linearly from the 1962 and 1963 estimates,
   1933-35, JCS, (figures exclude nonnegligent manslaughter).

4. Execution Rate, $(PXQ_1) = (E/Q \cdot P^{o}_{a} \cdot P^{o}_{c/a}) \cdot 10^{6}$ where,
   E = One year lead of the number of executions for murder
   1934-70, NPS, Bulletin No. 46, Aug. 1971, Table 1,
   Q, P^{o}_{a}, and $P^{o}_{c/a}$ are as defined in 1, 2, and 3 above.

5. Labor Force Participation Rate, L = CL/(NN-TL+CL) where,
   TL, CL = total and civilian labor force in 1000's,
   1933-69, EE, Table A-1,
   NN = total noninstitutional population 14 years of age and over before 1947 and 16 and over since 1947 in 1000's,
   1940-69, EE, Table A-1,
   1933-39, Total population 14 and over times (.988), the ratio of the 1940 noninstitutional population 14 and over to the 1940 population 14 and over HS, Series A22, A27.

6. Unemployment Rate, U,
   1933-69, EE, Table A-1.

7. Fraction of the Resident Population between 14 and 24, A=NY/NR where,
   NY = number of persons between 14 and 24 years of age in the resident population in 1000's,
   1933-39, HS, A28,
   1940-59, CPR, P-25, Nol 98,310. No. 311 contains estimate for total population,
   1960-69, CPR, P-25, No. 519,
   NR = Resident Population in 1000's,
   1933-50, HS, Series A2,
   1951-60, HSS, Series A2,
   1961-69, CPR, P-25, No. 519.

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SOURCES

1. Current Population Reports, (CPR) U.S. Bureau of the Census
2. Employment and Earnings, (EE) U.S. Bureau of Labor Statistics.
3. Economic Report of the President, (ERP), 1970.
4. Historical Statistics of the U.S., (HS), U.S. Bureau of the Census.
5. Supplement to HS, (HSS), U.S. Bureau of the Census, 1962.
6. Judicial Criminal Statistics, (JCS), U.S. Bureau of the Census.
7. National Prisoner Statistics, (NPS), U.S. Department of Justice; prior to 1950, U.S. Bureau of the Census
8. Statistical Abstract of the U.S. (SA), U.S. Bureau of the Census.
9. Survey of Current Business, (SCB), U.S. Department of Commerce.
10. Uniform Crime Report, (UCR), U.S. Federal Bureau of Investigation.

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Supreme Court, U. S.
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No. 73-7031

In the Supreme Court of the United States

OCTOBER TERM, 1974

JESSE THURMAN FOWLER, PETITIONER

v.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

A. RAYMOND RANDOLPH, JR.,
Deputy Solicitor General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-7031

JESSE THURMAN FOWLER, PETITIONER

v.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will address the question whether the death penalty is always or inevitably cruel and unusual punishment within the meaning of the Eighth Amendment.

INTEREST OF THE UNITED STATES

The question presented in this case is whether North Carolina's imposition of a mandatory death penalty for those convicted of first degree murder

is cruel and unusual punishment forbidden by the Eighth Amendment. Petitioner argues that the death penalty is unconstitutional because it is excessively cruel and because it is invariably applied arbitrarily; acceptance of either argument will affect, if not decide, the validity of any other conceivable death penalty statute.

The United States believes that imposition of the death penalty may sometimes be a necessary and appropriate measure to achieve the traditional goals of criminal justice. After this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238, Congress enacted a statute providing the death penalty for aircraft piracy that results in death (App. A, *infra*; Pub. L. No. 93-366, 88 Stat. 409). In addition, Congress has other bills under consideration (*see, e.g.*, S. 1401, 93d Cong., 2d Sess., which was sent to the floor by the Senate Judiciary Committee and is reproduced in App. B, *infra*) that authorize the death penalty in different situations. Although we do not specifically address the North Carolina approach, the approach of the Antihijacking Act of 1974, or any particular alternative approach, the United States has an important interest in this case because the Court's decision could affect the validity of every alternative procedure and, if petitioner's arguments are accepted, render the death penalty *per se* unconstitutional (but see p. 15, *infra*).

STATEMENT

1. During a craps game on the afternoon of July 1, 1973, petitioner and John Griffin argued about a

ten-dollar bill that Sylvester Jones had requested petitioner to watch.[1] Later that day petitioner and Griffin, who were well acquainted, met again in a bar and resumed their argument. Griffin asked petitioner to step outside; as petitioner was walking out, Griffin knocked him down, breaking his nose.

Petitioner left the bar and returned home. A friend, Johnny Frazier Dolby, later drove him toward an apartment complex where petitioner's sister-in-law lived. As they approached the complex, they saw Griffin and Griffin's two children on the steps of his neighbor's house. Griffin walked over to the car, which had stopped, and said to petitioner: "I don't want to fight you no more. I want you to go home."

Petitioner then asked Dolby to take him home, but after Dolby had driven a short distance petitioner told Dolby to stop the car and let him out. After he left the car, petitioner walked back toward Griffin and shot him twice at close range. One of the bullets struck Griffin in the abdomen and killed him.

Petitioner's evidence, while generally consistent with the state's theory of events, sought to establish that the shooting was in self-defense. Petitioner testified that he was carrying a pistol because he had intended to go fishing that day with some friends, and needed a gun to shoot snakes. He said that after his fight with Griffin outside the bar, Charles Rogers told him: "Man, you better go ahead on because John

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[1] This brief summary of facts is taken from the trial transcript (App. 8-69) and the opinion of the Supreme Court of North Carolina (App. 88-91).

Griffin is trying to get a pistol to kill you." Rogers corroborated this testimony. Petitioner also testified that after he left Dolby's car, Griffin confronted him and said: "Nigger, I am going to make you use what you have got in your pocket." According to petitioner, he was intoxicated at the time of the slaying and intended to keep Griffin away rather than to kill him.

2. Petitioner was indicted for murder in the first degree, in violation of Section 14-17 of the General Statutes of North Carolina, as construed in *State* v. *Waddell*, 282 N.C. 431. The trial court instructed the jury that it could return one of four verdicts (App. 71): not guilty, manslaughter, murder in the second degree, or murder in the first degree. The court explained (App. 72-73) that, in order to convict petitioner of first degree murder, the jury had to find beyond a reasonable doubt that petitioner shot Griffin intentionally and with malice, and that he acted with premeditation and deliberation. The court instructed the jury to consider petitioner's plea of self-defense (App. 79-82). The jury returned a verdict of guilty of murder in the first degree. The trial court sentenced petitioner to death by the inhalation of lethal gas, the only possible sentence under Section 14-17 as construed.

The Supreme Court of North Carolina held that there was no error in the trial and affirmed both the verdict and sentence, expressly rejecting (on the authority of *Waddell*, *supra*, and *State* v. *Jarrette*, 284 N.C. 625) petitioner's argument that the imposition of the death penalty would be cruel and unusual pun-

ishment. Three justices dissented on the ground that *Waddell* was incorrectly decided under the state severability law because the conversion of Section 14-17 to a "mandatory" death statute should have been left to the legislature.[2]

SUMMARY OF ARGUMENT

The death penalty is a traditional sanction for those offenses society considers the most dangerous. Whether that penalty is necessary, or even appropriate, in a particular case is a judgment properly left to the representatives of the people and to the judges and juries who must decide whether to impose society's ultimate sanction. We submit that it is inappropriate for this Court to substitute its judgment about the propriety of the death penalty for that of the legislatures both more properly charged with the duty of making that judgment and more advantageously situated to collect and assess the relevant information.

We will not recount the positions taken by all nine members of this Court in *Furman* v. *Georgia*, 408 U.S. 238. Our argument is limited to those aspects

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[2] By an amendment effective April 8, 1974, North Carolina has conformed Section 14-17 to the judicial construction given it in *State* v. *Waddell*. The statute now provides a mandatory death penalty for all first degree murders, which are defined as all murders "perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony * * *." Session Laws 1973, c. 1201, s. 1.

of the capital punishment controversy that concern the propriety of this Court's exercise of power to nullify the considered judgments of the legislatures in 31 states, and of Congress, that capital punishment is a legitimate response to certain crimes. We do not discuss the constitutionality or the propriety of any particular laws; instead we argue that neither the harshness of the penalty, nor the procedures necessarily used to administer it, render capital punishment unconstitutional *per se*. Judicially ascertainable changing standards of decency and the discretion built into our criminal justice system do not operate to make all death penalties cruel and unusual punishment.

I

At the time the Eighth Amendment was approved by the states capital punishment was a common sanction for serious crimes. If the meaning of that amendment were fixed by the practices in use at the time of its adoption, the outcome of this case would not be in doubt. But even if the cruel and unusual punishments clause must also be considered in light of the evolving standards of decency that mark a maturing society, the history of the amendment provides guidance to the understanding of how contemporary standards are to be evaluated, and how they are to be weighed against competing social goals.

The cruel and unusual punishments clause first appeared in the Bill of Rights of 1689, a reaction by Parliament to the excesses of the Stuart courts, and

particularly to Lord Chief Justice Jeffreys, who invented new combinations of punishments, not authorized by Parliament, and applied them in unusual fashions against the King's enemies. At the time the cruel and unusual punishments clause first appeared, drawing and quartering, and burning alive, were the usual methods of execution in England, and apparently were unaffected by the new clause. The clause instead appears to have been one chapter among many in the long struggle between King and Parliament to allocate the right to govern—cruel punishments were to be forbidden unless authorized by Parliament. The clause did not, however, restrict the power of Parliament to invent or prescribe punishments appropriate to an offense.

The clause was adopted in the United States with little debate, and we therefore cannot know whether the framers intended to adopt the clause with its English meaning. There is some evidence in the debates that it was directed against "barbarous" punishment that would amount to "torture." Others who originally had called for such a clause were concerned about the potentially unbridled punishing power of Congress. We can conclude from these debates that the American cruel and unusual punishments clause, unlike the English, binds legislators as well as judges. But nothing in the debates supports an inference that the framers thought that capital punishment would be prohibited.

II

This Court's Eighth Amendment decisions have established the principle that the cruel and unusual punishments clause prohibits punishments that lie outside the bounds of tolerable social behavior. But all of the cases that have held punishments unconstitutional under the clause have dealt either with a strange form of punishment not used in American law (see, *e.g.*, *Weems* v. *United States*, 217 U.S. 349) or punishment applied to a "status" that could not be made criminal (*Robinson* v. *California*, 370 U.S. 660). In each case involving the former category, it has been necessary to ascertain the limits established by the social consensus, and then to determine whether they have been transgressed. It also has been helpful to determine the reason why society had not rid itself of the apparently aberrant punishment without the need for judicial intervention.

When a penalty is enacted by a legislature and imposed only by a unanimous jury, the sanction is very unlikely to be outside the bounds of social tolerance. In our form of democracy the will of the people is expressed through their representatives. Since this Court's decision in *Furman* v. *Georgia*, at least 31 states and the United States have enacted new statutes providing for the death penalty. We submit that it is utterly implausible that so many legislatures can, time and again, fail to reflect the will of the people concerning capital punishment. Were this Court to hold the death penalty unconstitutional, it would have to conclude that it—whose justices are

not elected and have been given life tenure in order to insulate them from popular and political opinion—is more conscious of and more responsive to the will of the people than are the representatives directly elected by and responsible to those people. Petitioner seeks a referendum among judges as a proxy for the "true" will of the people. But if the people are to give their verdict of what is cruel and unusual, the people—through their elected representatives and through juries—must sit in judgment.

To the extent the constitutionality of capital punishment depends not only on the limits of current social tolerance, but also on the nature of the purposes served by the sanction, we submit that capital punishment serves important and legitimate purposes. Because capital punishment is society's "ultimate" sanction, it is likely to have a stronger effect as a deterrent than do alternative sanctions. The most recent study of the deterrent efficacy of the death penalty supports this intuitive conclusion. After performing a sophisticated regression analysis that analyzed the effects of many independent variables, the study concluded that, over the past several decades, each execution actually carried out deterred a significant number of murders. Other studies of the death penalty are infected by serious analytical flaws, and so do not provide support for a contrary conclusion. But quite aside from empirical studies, the legislature is entitled to credit the logical argument that capital punishment deters crime because it is society's most severe sanction. This alone is sufficient to satisfy

any constitutional requirement that the death penalty serve important social purposes.

Capital punishment of course serves other purposes as well. The death penalty serves a vital function as society's expression of moral outrage, and marks off some crimes as so repulsive that they are to be avoided by those individuals with even a trace of social responsibility. Some crimes, too, are so vicious, so offensive to society's standards of decency, that they call out for an ultimate sanction in order to reinforce the social feeling of revulsion to acts of that character. This response—retribution perhaps, although without vindictiveness—has been endorsed by respected commentators and seems an essential ingredient of a healthy society.

Finally, capital punishment incapacitates some individuals who, if allowed to remain alive, would be so immune to normal forms of social control that they would continue to commit murders even if sentenced to life imprisonment without possibility of parole. The federal prison system now confines at least one man who, since his incarceration for murder, has committed and been convicted of murders within prison on three separate occasions. This man, and others like him, will find opportunities to kill again, regardless of the care taken to guard them, and we submit that the Eighth Amendment does not compel society to grant them those opportunities.

Although there may be legitimate differences of opinion regarding capital punishment's acceptance

by modern society, its value as a deterrent, and society's need for it to reinforce social values and incapacitate dangerous offenders, those differences of opinion are to be resolved by the legislature; and the legislative judgment on these matters should be accepted by the judicial arm. Once the Court has satisfied itself that there is support for the legislature's decision, its role has been exhausted. There may be no way to exclude the possibility that an omniscient observer would conclude that all legislatures were mistaken in believing that capital punishment is ever appropriate, but the data such an observer would use, and the standards he would apply when weighing the moral values implicated in the death penalty, are beyond the ken of courts and perhaps beyond the ken of mankind. The judgment of a legislature that capital punishment is necessary and appropriate is based on its evaluation of unsettled empirical and moral questions, and its resolution of those questions should not be cast aside.

III

We agree with petitioner that the process by which the criminal justice system operates, involving charging discretion, plea bargaining, the jury's ability to acquit, and executive clemency, involves discretion that will be with us so long as we have a system of criminal *justice*. But the inevitable presence of such discretion cannot render the death penalty unconstitutional—indeed, it is an odd argument to make, because it requires the Court to conclude that although the Eighth Amendment does not in the abstract bar

death as a form of punishment, that the death penalty can never be imposed under the criminal justice system established by our Constitution. To the extent it is a challenge against discretion in the criminal justice system, the argument assails that discretion as applied to all crimes, whether or not a death penalty results. Every argument petitioner makes is equally applicable to life imprisonment.

Petitioner's argument also is odd because it is cast in Eighth Amendment rather than in Fifth Amendment terms. We would suppose that if a court were concerned with the procedures by which capital punishment is imposed, the appropriate avenue of inquiry would be the Fifth Amendment's command that no person may be "deprived of life * * * without due process of law." That, of course, was the argument in *McGautha* v. *California*, 402 U.S. 183, with respect to jury discretion, and the Court rejected it. The argument should be cast in that form here as well. Some of petitioner's contentions—such as his claim that laws providing for capital punishment often are too vague to enable the jury to decide when such a crime has been committed, or that plea bargaining offers opportunities for discrimination—are particularly appropriate candidates for such narrow presentation. The vagueness doctrine is well defined, and excessively vague statutes may be set aside without calling into question the ability of the legislature to provide for capital punishment. Similarly, racial or other invidious discrimination occurring in plea bargaining, or at other stages of the criminal justice system, is unconstitutional and may

be challenged directly. But this is not an argument against the imposition of the death penalty by a criminal justice system that does not so discriminate. No one would argue that because juries might unlawfully discriminate, juries should be abolished. Similarly, if, as we argue, the death penalty is not a forbidden type of punishment, it cannot be abolished on the basis that some individuals might seek to impose it for invalid reasons. The same can be said for any punishment.

As for the remaining avenues of discretion, each is either required or encouraged by the Constitution itself. The prosecutor's unfettered discretion to decline to prosecute is largely a product of the separation of powers in our constitutional system. It is a discretion necessary to enable the prosecutor to fulfill his duty under the Due Process Clause not to prosecute an individual unless there is a reasonable prospect of conviction.

Plea bargaining has been approved by this Court, which has stated that it is to be "encouraged." *Santobello* v. *New York*, 404 U.S. 257, 260. Moreover, plea bargaining, like the other sources of discretion assailed by petitioner, operates in favor of an accused, and (unlike some other sources of discretion) only at his behest. An individual need not engage in such bargaining unless he believes it will be advantageous.

The power of a jury to acquit despite evidence justifying conviction derives from and is protected by the Sixth Amendment right to trial by jury, and

the same provision creates the jury's right to convict of lesser included offenses (again at the behest of the accused) if it finds facts that make such a conviction appropriate.

Finally, the power of the executive to grant clemency is established by the Constitution, and as this Court recently held (*Schick* v. *Reed*, No. 73-5677, decided December 23, 1974), it is an unfettered power because the essence of mercy is discretion.

In the last analysis, petitioner seeks to convince this Court that procedures required or encouraged by one part of the Constitution inevitably produce a result forbidden by the Eighth Amendment. But the Eighth Amendment requires no such result, and, to the extent there is any leeway in construction, the Amendment should be read in a manner that makes it harmonious with, rather than antagonistic to, the remainder of the Constitution. The Court should not rule that although the process and procedures used in imposing the death penalty are constitutionally permissible, indeed in many instances compelled, the death penalty is nevertheless unconstitutional under the Eighth Amendment *because* of those very processes and procedures. Yet that, we submit, is the essence of petitioner's argument in this regard.

ARGUMENT

Petitioner was sentenced to death under a procedure created by the Supreme Court of North Carolina in *Waddell*, *supra*. This judicially-prescribed punishment may be more vulnerable to an Eighth Amendment challenge than is the same penalty when imposed at the direction of a legislature, for the reasons we discuss *infra* at pp. 24-31, 45-47. This case, therefore, does not necessarily present for decision the propriety of a clear legislative decision to impose the death penalty. But see n. 2, *supra*. The petition for certiorari stated (Pet. 10) that petitioner would challenge North Carolina's course as an "evasion" of *Furman*. Although petitioner's brief (Pet. Br. 16-26, 104 n. 156) impugns the judicial decision to make the death penalty mandatory, petitioner has expressly refrained (Pet. Br. 23-24) from presenting it as a question for this Court, and has not distinguished between judicial and legislative decisions that capital punishment is appropriate for particular crimes. Though this fact deserves note, we address only the segment of petitioner's argument that the death penalty imposed by a legislature is always and inevitably cruel and unusual punishment.

I. THE ORIGINS OF THE EIGHTH AMENDMENT SHOW THAT A LEGISLATURE MAY CONSTITUTIONALLY PROVIDE FOR CAPITAL PUNISHMENT

At the time the Eighth Amendment was approved by the states, capital punishment was a common sanction for serious crimes. There is nothing in the de-

bates accompanying its adoption to indicate that the framers anticipated that the Eighth Amendment would, either then or in the future, prohibit the imposition of capital punishment. All indications are to the contrary. The Constitution itself assumes the validity of capital punishment. The Fifth Amendment, adopted at the same time as the Eighth, contains three references to the death penalty, and the Fourteenth Amendment also provides that no state shall deprive any person of "life, liberty, or property" without due process of law. Indeed, under legislation passed by the First Congress death was a penalty provided for a variety of offenses. 1 Stat. 112.

For nearly two centuries this nation justifiably assumed that the death penalty was a permissible sanction, to be imposed according to statute—a sanction legislatures could choose as the necessary and appropriate response to certain criminal activity. This consensus was so complete that the constitutionality of the death penalty never directly came before this Court. Because no Justice believed that the penalty itself was improper, it was unnecessary even to discuss the proposition; cases turned simply on the manner of its imposition. See *Wilkerson* v. *Utah*, 99 U.S. 130 (death by public shooting not cruel and unusual); *In re Kemmler*, 136 U.S. 436 (death by electrocution not cruel and unusual); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (death by repeated electrocutions not cruel and unusual); *Trop* v. *Dulles*, 356 U.S. 86, 99 (dictum). Cf. *Weems* v. *United States*, 217 U.S. 349, 382, 409 (White, J., joined by Holmes, J., dissenting); *McGautha* v. *California*, 402 U.S.

183, 226 (opinion of Black, J.). See also *Storti* v. *Commonwealth*, 178 Mass. 549 (Holmes, C.J.).

If the meaning of the Eighth Amendment were fixed by the practices of its framers, the outcome of this case would not be in question. However, this Court has concluded that the legality of a penalty under the Eighth Amendment must also be considered in light of the changing standards of decency that mark an evolving society. *Weems* v. *United States*, *supra*; *Trop* v. *Dulles*, *supra* (plurality opinion). If the cruelty and the unusualness of a penalty is to depend to some degree on the changing standards of decency in society, so that the amendment is, to that degree, a barometer of contemporary "social conscience" as well as a reflection of historical traditions, it is necessary to know how contemporary standards are to be evaluated, and once evaluated, how this data is to be weighed. Nevertheless, one thing is certain: the historical background of the Eighth Amendment must be consulted in order to determine the meaning of "cruel and unusual punishments." History may not completely fix the meaning but it sets limits, and the words used by the framers acquire scope and function from the events they summarize.

A. The English Experience

Until the late 1600's England had developed no general prohibition against cruel, barbarous or illegal punishments. The Magna Carta forbade excessive punishments, but "excessive" meant death for a trifling offense. Holt, *Magna Carta* 323 (1965); cf.

Barrington, *The Magna Charta and other Great Charters of England* 181, 199 (1900). The criminal law was severe and unyielding; even though some charters reserved great punishments for "great" crimes, most thefts were felonies, and felonies were capital offenses. 1 Stephen, *History of the Criminal Law in England* 457-492 (1883). The slogan, often accepted even in the seventeenth century, that "the punishment should fit the crime" (see Perry, *Sources of Our Liberties* 236 (1959)) simply meant that, however much greater the punishment than the harm inflicted by the crime, some measure of proportionality was necessary, and a comparison to other authorized punishments appropriate.

The phrase "cruel and unusual punishments" was first used in the Bill of Rights of 1689, drawn up by Parliament as part of the accession of William and Mary. Perry, *supra*, at 247. Most historians have attributed this clause to Parliamentary reaction to the "Bloody Assize" of 1685, a series of treason trials held after the abortive uprising by the Duke of Monmouth. See generally, Granucci, *'Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Calif. L. Rev. 839, 852-860 (1969) (which questions this attribution).

Monmouth's rebellion was an attempt to overthrow King James II. Monmouth was defeated and the king appointed Chief Justice Jeffreys of the King's Bench to a special assize to try the captured rebels. Because of the number of treasonous prisoners a series of trials would have been lengthy and complicated;

Jeffreys undertook to simplify his task by engaging in plea bargaining. Those who pleaded guilty were promised that their lives would be spared; many did so, but James II and Jeffreys reneged on the bargain and executed many of the prisoners the next winter. After James II had fled, Parliament reacted to the Bloody Assize of the previous year with proposals to secure the people against the "illegal and cruel" punishments by such special (and unauthorized) tribunals. See Somers, *A Vindication of the Late Parliament of England* 3 (1690).[3]

Granucci, on the other hand, attributes the cruel and unusual punishments clause of 1689 to the history of Titus Oates and the "Popish Plot" of 1678-1679. Granucci, *supra*, at 856-860. The "Popish Plot" was a ruse by Oates to convince his countrymen that Catholic agents would assassinate Charles II and place the Catholic James II on the throne. Oates swore to the fictitious "plot" and in the ensuing commotion 15 Catholics were tried and executed.

Oates' perjury was exposed after the succession of James II, and Oates himself was tried and convicted by the King's Bench, Chief Justice Jeffreys

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[3] The methods of punishment used by the Bloody Assize were not "cruel" within the English experience; the rebels were hanged, cut down and disemboweled while alive, drawn and quartered. Females were burned while alive. But the punishments were imposed by a royal tribunal, free of Parlimentary control or authorization. To that extent they were unauthorized. And, of course, because many of the executions were in violation of the original pleas and judgments, they were "illegal."

presiding, and sentenced to a fine, life imprisonment, whippings, defrocking, and pillorying four times yearly. The House of Lords upheld the judgment, but the Commons intervened on behalf of Oates, on the basis that this punishment was inhumane and illegal because not authorized by Parliament. The objection again was that the combination of pains and penalties had never been authorized as a response to the crime of perjury, and that the court was without jurisdiction to impose it, even though life imprisonment, whippings and pilloryings were common sanctions both singly and in combination, and could not, in the seventeenth century, have been thought "excessive" for a crime that had sent 15 innocent people to their deaths.

The English history of the prohibition of cruel and unusual punishments, therefore, supports at most a prohibition against punishments unauthorized for the crime, and against egregiously disproportionate punishments for nonfelony offenses. The prohibition did not restrict the punishing power, nor did it limit punishments to those minimally "necessary" in light of the crime. Parliament was attempting to bridle the King's courts;[4] there is no hint that Parliament was attempting to inhibit its own judgments or was

[4] The preamble to the Bill of Rights of 1689 stated that James II and his courts were arbitrarily "assuming and exercising the power of dispensing with and suspending of laws and the execution of laws, without consent of parliament." The King had claimed such power. See Kenyon, *The Stuart Constitution 1603-1688*, 420-426 (1966).

authorizing the courts to do so.[5] The Bill of Rights of 1689 did not secure the liberties of the people. It was simply another tool in the extended struggle between Parliament and King to allocate the power to govern.

B. The United States' Derivation of the Clause

The debates at the time of the adoption of the Eighth Amendment reveal little about the framers' understanding of its origins or meaning. The Senate debates on the amendments were closed entirely (Goebel, *History of The Supreme Court of the United States, Vol. I: Antecedents and Beginnings to 1801* 444 (1971)) and little was said about the clause in the recorded debates.

The materials available from colonial times are not sufficiently comprehensive to enable historians to ascertain the source of most of the amendments that comprise the bill of rights. Professor Goebel has speculated that the proposed amendments were compiled in grab-bag fashion from lists of rights that were known to the colonies from treatises on English law and had, in one fashion or another, become part of the law of one or more of the colonies.

[5] Cf. *Martin* v. *United States*, 317 F.2d 753, 755 (C.A. 9): "[I]t is well settled that a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment * * *." Even in 1769 Blackstone believed that cruel and excessive punishments were controlled only by the "tacit consent" of the people, 4 Blackstone, *Commentaries on the Laws of England* 369-373 (1769), and that the Bill of Rights of 1689 did not constrain Parliament.

See also Levy, *The Origins of the Fifth Amendment* 411 (1968). The cruel and unusual punishments clause of the Eighth Amendment was taken verbatim from the English Bill of Rights of 1689, although several of the colonial constitutions had similar provisions.

Its insertion may well have been prompted by complaints in the state ratifying conventions that the Constitution contained no limits on the methods of federal punishment. For example, in the Massachusetts convention of January 1788, an objection was made that

> [Congress will] have to ascertain * * * and determine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments and annnexing them to crimes; and there is no constitutional check of them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline. [2 Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 111 (2d ed. 1836).]

See also *Furman, supra,* 408 U.S. at 320-321 (Marshall, J., concurring). In the Virginia debates Patrick Henry objected to the possibility of uncontrolled use of "tortures" and "barbarous" punishments, and George Mason explained that such punishments were prohibited in Virginia by the Virginia constitution's cruel and unusual punishments clause, which would forbid all "torture." 3 Elliot, *supra,* at 447, 452.

These expressions may indicate that the framers desired a clause that would bind legislators as well as judges; there is no contrary indication in the sparse debates in the House of Representatives. But the emphasis by those who objected to a lack of a cruel and unusual punishments clause was the need for a prohibition of "torture" or other barbarous forms of punishment, thus showing that legislatures were to continue to have considerable leeway in determining the scale of punishments to be used.

During the debates on the floor of the House only two representatives spoke to the cruel and unusual punishments clause. Mr. Smith of South Carolina believed that the clause was too "indefinite" and Mr. Livermore thought it unnecessary. Mr. Livermore went on to argue that some punishments (such as hanging, whipping and cutting off of ears) were "cruel" but necessary. 1 Annals of Congress 753-754 (1789).

It is difficult to interpret the vote in favor of the clause immediately after this objection. Because hanging was an accepted penalty for crime at the time, and because the first Congress itself provided for capital punishment, it can be inferred that these early congressmen thought Livermore's interpretation of the clause not well taken; even though a punishment might be "cruel" it was not inevitably to be prohibited by the clause. In affixing individual responsibility, Congress would be permitted to use its judgment, weighing the inevitable cruelty of *any* punishment against the social need for it.

The amendment fell into desuetude after its adoption; cases rarely discussed it, and no penalty was

held forbidden under it until *Weems* was decided in 1909. This was probably the proper "fate" for the amendment in light of its history, for the history discloses, to the extent it discloses anything, that the amendment was an attempt to guarantee against the new national government, concerning which many persons were apprehensive, a then-prevalent social consensus that some punishments were simply beyond the pale of civility. The fears were not well-founded, and the guarantee, given our form of government, was largely, though, as we will show, not completely, unnecessary. Any such punishment would almost invariably be extinguished by the legislature before it could be tested in the courts. Were a punishment intolerable, it would be rejected by the people themselves—and that rejection would come not only by legislative repeal or alteration but also by the refusal of juries to convict of crimes carrying the intolerable punishment. In this light, the amendment states a standard below which communities and their legislatures may not fall and provides a safeguard against the very rare aberational case. A case is aberational if the punishment imposed is profoundly and demonstrably contrary to prevailing standards of decency.

C. Judicial Construction

If the Eighth Amendment enforces the evolving standards of decency that mark a civilized society, the Court must first ascertain whether there is a particular social consensus concerning the practical and ethical values that pertain to punishment, and whether

a particular punishment transgresses the limits established by that consensus. This Court's Eighth Amendment decisions have attempted to undertake such an inquiry, and have facilitated that investigation with an additional inquiry into the reasons why society failed to prevent the "intolerable" punishment without judicial intervention. If such a reason explaining the apparently deviant assessment of punishment is present there will be additional support for the judicial inference that those who have imposed the punishment—rather than those who sit in ultimate judgment—have misapprehended the social standards of decency.

In *Weems* v. *United States*, *supra*, this Court dealt with *cadena temporal*, a Philippine traditional punishment (for even petty offenses) that imposed 15 years' "hard and painful labor," the constant wearing of chains, loss of all civil rights, and perpetual surveillance. The punishment failed the "consensus" test because it was not native to this country and never had been an accepted punishment for crimes here. The penalty, by all American standards, was patently harsh and disproportionate to the offense. Nor was it difficult to see why the consensus had failed to make itself felt without judicial intervention: the penalty had been invented by a foreign legislature and was imposed by a foreign judicial system unaccustomed to our sensibilities.

In *Trop* v. *Dulles*, *supra*, a plurality of this Court concluded that denationalization was cruel and unusual punishment. The power to denationalize a de-

serting soldier had been placed in the hands of military officials, and they had used it to strip citizenship from Trop, who had "deserted" for a single day and voluntarily surrendered. There, too, the consensus had failed. Denationalization was not a traditional American punishment for crime; it was (of course) not used by any state. The plurality concluded that citizenship is not subject to the general powers of Congress; Congress therefore could not authorize this admittedly unusual punishment regardless of whether it was appropriate—an issue the plurality thought irrelevant. Mr. Justice Brennan, concurring (356 U.S. at 105), joined in this conclusion. Moreover, the Court highlighted the mechanism through which the social consensus had been avoided: the decision to denationalize had been removed from a jury, which could refuse to impose socially unacceptable punishments, and had been placed in the hands of military authorities (a general court-martial convicts by less than unanimous vote and therefore is, for example, less likely to reject unacceptable punishments and courts-martial are not designed to produce a cross-section of the civilian community). See the opinion of Mr. Justice Black, concurring, 356 U.S. at 104-105.

The use of the Eighth Amendment in *Robinson* v. *California*, 370 U.S. 660, varies somewhat from this pattern but is not inconsistent with it. In *Robinson* the Court did not hold that some particular penalty was cruel and unusual, but that *any* penalty for narcotic addiction would be cruel and unusual because a status, as distinguished from an act, could not be

a crime. That is a decision different in kind from the decision involved in this case. *Robinson* decided that some things could not be made crimes, not that certain crimes could not be punished as the legislature chose.

In other cases in which this Court has upheld specific penalties it has decided that the penalty itself did not overstep the tolerance of the social conscience. For example, in *Howard* v. *Fleming*, 191 U.S. 126, the Court rejected a claim that ten years' incarceration for conspiracy to defraud was cruel and unusual; the Court concluded that such a course had not been rejected by the people as barbarous or depraved, was accepted by many legislatures, and was not egregiously disproportional to the provocation. See also *Badders* v. *United States*, 240 U.S. 391; *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U.S. 407.

The lower courts have, in the main, followed a similar course. They have approved legislatively prescribed penalties unless there was evidence that other jurisdictions rejected those penalties and, in addition, the penalties appear to be so excessive that they are repulsive and unnecessary. See, *e.g.*, *United States* v. *Beverely*, 416 F.2d 263 (C.A. 9) (25-year minimum sentence for aggravated mail robbery).[6]

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[6] Following the same analysis, but reaching a different result, is *Hart* v. *Coiner*, 483 F.2d 136 (C.A. 4), which holds that life imprisonment for petty recidivism is cruel and unusual because it has been rejected by almost all states.

There has been considerably less deference shown to punishments decreed or augmented by administrative officials; in such cases there are greater opportunities for individuals to impose punishments for which society would not vote and would not tolerate were they known. The smaller the decision-making body, the more likely it is to err in its reading of the demands of the social mores and the less likely the penalty will be brought to public attention for correction. Moreover, to the extent punishment is imposed or augmented by administrative officials without specific sanction from the legislature, the responsibility for punishment has been removed from a body ultimately responsible to the people. There has, therefore, been a greater willingness to examine the potentially barbaric conditions created by isolated prison officials (see, *e.g.*, *Holt* v. *Sarver*, 442 F.2d 304 (C.A. 8); *Finney* v. *Arkansas Board of Correction*, 505 F.2d 194 (C.A. 8)) or even by individuals within a prison system who act to deprive an inmate of medical care or protection from other aggressive inmates (see, *e.g.*, *Newman* v. *Alabama*, 503 F.2d 1320, 1330-1332 (C.A. 5)).

Because even at its broadest interpretation the cruel and unusual punishments clause protects against only those punishments utterly outside the bounds of social tolerance, it is not surprising that great deference should be shown to penalties selected by a legislature and enforced by the unanimous decision of a jury. In a representative democracy the legislature speaks for the people that elected it. Once enacted, the penalty

cannot be imposed unless the people themselves, acting as a jury of the peers of the accused, agree to its imposition. And the jury, with its prerogative to "nullify" laws and penalties repellent to its sensibilities, is an effective ultimate check against legislative aberrations.

Thus, if a penalty can pass the dual tests of enactment by the people's representatives, and application by the people themselves sitting as a jury, it is almost certainly not so cruel, disproportionate, or repulsive to the sensibilities of modern society that it is forbidden by the cruel and unusual punishments clause. Those who would paint it so must make their case by clear and convincing evidence. They cannot call on this Court to sit as a "super-legislature" (*Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 534 (Brandeis and Holmes, JJ., dissenting)) and assess merely whether the legislature's decision was wise.

II. THIS COURT SHOULD UPHOLD A PENALTY ENACTED BY A LEGISLATURE, SERVING LEGITIMATE PURPOSES, AND ACCEPTED BY CONTEMPORARY SOCIETY

If our analysis of the cruel and unusual punishments clause is correct, that clause forbids only penalties similar in nature to those the framers wished to forbid (a category certainly not involved here) or penalties that fall so far beyond the pale of social acceptability that they appear as aberrations. The clause is appropriately directed to such aberrations, in which, through a combination of circumstances (whether uninformed, accidental or malign),

a punishment utterly unacceptable to society has been decreed or imposed. A solitary individual, whether he be legislator, prison administrator, judge or juror, could assess a penalty or create conditions offensive to contemporary standards of decency. But it is difficult to see how such a mistake, such a gross misunderstanding, can be made time and again by legislatures of the several states and the Congress, and by the juries that assess guilt with the knowledge of the potential penalties. There are too many participants in the process, too many individuals (including, as well, the prosecutor, grand jury, and governor or other clemency authority) *each* of whom would have to be ignorant of or flaunt society's demands, for it to be true that a legislatively enacted and judicially enforced penalty could constitute cruel and unusual punishment. We do not claim that even this process can never err. It is conceivable that aberrant laws can be passed and aberrant juries found. But the challenge raised by petitioner is not a challenge to unusual or freakish events; most states provide for capital punishment, and in less than two years in the single state of North Carolina juries have convicted and condemned to death more than sixty individuals.

How then can it be declared by this Court, by any court, that the death penalty contravenes evolving standards of decency or contemporary notions of human dignity or society's currently-held moral values? The framers of the Constitution "might have made the judge the mouthpiece of the common will, finding it out by his contacts with people generally; but he

would then have been ruler, like the Judges of Israel."[7] The question cannot be avoided: if this Court were to hold that the death penalty violates evolving standards of decency, would not one then be required to conclude that 31 state legislatures and the Congress of the United States are unenlightened, that they are out of step with contemporary moral standards and the will and spirit of the people who elected them? Courts can announce their view of society's standards of decency and, by doing so, encourage public acceptance of what can at best be only a prediction. But with respect to the death penalty, the Court has previously spoken[8] and it has seen the response.

This is not to say that the position espoused by an enlightened few is to be ignored. It is not. In all societies, in all ages, the ideas of those in a minority have influenced and inspired those in the majority. But this describes the legislative process, not the judicial. Only when a minority opinion has gradually made its way to acceptance by the society can we be sure that it was and is the enlightened view and not merely an unpopular and unpersuasive opinion. If judges anticipate the moral verdict of society, they will frequently anticipate incorrectly and fasten their own views upon the nation in the name of enlightenment. Such a theory of judicial power resembles too

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[7] Learned Hand, "How Far is a Judge Free in Rendering a Decision?" (1935), in *The Spirit of Liberty* 109 (Dilliard ed. 1953).

[8] *Furman* v. *Georgia*, *supra*.

closely Rousseau's concept of the general will, which is entitled to govern even when possessed only by a minority, and is equally antithetical to the tenets of representative democracies. If, as the Eighth Amendment contemplates, the people are to give their verdict of what is cruel and unusual, the people—through their elected representatives—must sit in judgment.

A. Capital Punishment Serves Legitimate Purposes

In enacting death penalty statutes, the legislatures throughout the country have not acted irrationally. Capital punishment serves several important social purposes, among which are deterring crimes and expressing society's moral outrage in a manner that shapes and reinforces the community's standards.

1. *Capital Punishment Deters Crime.*

There is an inherent logic to the belief that the death penalty deters at least some people from committing crimes. "Belief in the deterrent efficacy of penal sanctions is as old as the criminal law itself." Zimring & Hawkins, *Deterrence* 1 (1973). Just as some penalty deters a prospective offender by making the prospect of crime less attractive, so does a more severe penalty make crime still less attractive, and so less likely to occur. Because death is perceived by most potential law breakers as the maximum feasible penalty, it is probably the most effective deterrent force. "*Prima facie* the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment * * *."

Royal Commission on Capital Punishment, *1949-1953 Report*, ¶ 61 (1953). It is not unreasonable or insupportable for a legislature to credit an argument with such strong plausibility.

The primary arguments against the deterrent force of capital punishment are that criminals (by definition) are not "normal" people, and so do not respond in "normal" ways, and that many murders or other capital crimes are crimes of passion and hence not deterrable. Neither argument supports a conclusion that capital punishment does not have a deterrent effect. The only surface evidence that criminals are not "normal" is their failure to conform to some social "norms"; that evidence alone is not proof (or even support) for the proposition that "criminals" do not respond to incentives, to the prospect of pain or pleasure.[*]

We can conclude, perhaps, that those who do not obey the laws have little respect for the law *per se*, and in that sense lack a "normal" trait. But we cannot conclude that all criminals are completely insensitive to deterrence merely because they commit crimes; we can validly conclude only that they have evaluated the prospects of success (and the "cost" to them of apprehension) differently from those who have the propensity to offend but do not. See Packer, *The Limits of the Criminal Sanction* 40-45 (1968). In-

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[*] Cf. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 458-459 (1897) (it is the "bad man" whom the law regards as "normal," for only when a man is "bad" must the law depend on its threats of pain to change his behavior).

deed, the efforts of most criminals to avoid detection, and to escape after being caught, show very clearly that they are sensitive to a calculus of pains and pleasures.

Similarly, although there are many crimes committed in such intense passion that the offender may altogether neglect to consider the prospect of punishment in the future, the existence of such people and such crimes of passion does not indicate that there are no deterrable crimes. Some murders are committed for money, some after lengthy contemplation. Treason, espionage, sabotage, aircraft piracy and deliberate wrecking of trains (all of them federal capital offenses) are prime examples of entire categories of offense committed after calculation and in pursuit of ulterior goals. The people who commit such crimes are rational (albeit misguided or evil) individuals, and there is no reason to believe they will not attend their own self-interest and consider the potential severity of the penalty that might be meted out in response. These crimes (at least) are sufficiently narrow and clearly defined, and sufficiently open to dissuasion by deterrence, that capital punishment is permissible for them regardless of its deterrent value as applied to other crimes. The death penalty could realistically be made a fully predictable response to these crimes, and those contemplating such criminal activity could be required to take into account a very great probability of execution if caught.

Moreover, although an individual may use a weapon in a fit of passion, the decision to carry a weapon at

all is made with a cool head and (often) considerable forethought. The prospect that he will find himself unable or unwilling to control the use of that weapon may cause many people not to possess or carry it, and consequently decrease the number of "passionate" killings.

Because it is reasonable for a legislature to believe that the prospect of capital punishment deters at least some people from committing serious crimes, it would take contrary evidence of the most clear and convincing sort to warrant a judicial conclusion that the legislature was irrational (see, *e.g.*, *Ogden* v. *Saunders*, 12 Wheat. 213). No such evidence exists.

The most recent study of the deterrent efficacy of the death penalty [10] has tentatively concluded that when capital punishment was *actually used* a significant number of lives were saved: over the period studied, and after controlling for the effects of other variables, using the death penalty instead of imprisonment may have deterred approximately eight murders for each execution actually carried out. Although the results reported in this study are preliminary and subject to further analysis, and therefore cannot be interpreted as predicting either the exact magnitude of the deterrent effect of capital punishment or the effect of the death penalty when used in a way differ-

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[10] Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 18 National Bureau of Economic Research Working Papers (November 1973). A revised version of this paper will appear in the June 1975 issue of the American Economic Review, and additional papers will expand on the tentative conclusions Professor Ehrlich has reached.

ent from its use in the conditions surveyed, this study at the least indicates that there is important empirical support for the *a priori* logical belief that use of the death penalty decreases the number of murders.

Other studies of the deterrent value of the death penalty (see, *e.g.*, Sellin, *The Death Penalty* (1959)) have not concluded that there is proof that capital punishment deters crime. But neither have they supplied proof that it fails to deter. Zimring & Hawkins, *supra*, at 254-255, 257-258. All of the studies that have found no measurable deterrent effect from the death penalty have shared certain investigatory flaws. For example, these studies have relied not upon the actual *use* of the death penalty, but upon its statutory authorization, as the independent variable against which the murder rate was compared. All of the available studies have evaluated the effect of the death penalty on the overall murder rate, rather than on the rate of capital murders, and so the studies cannot exclude the possibility that the death penalty deters the commission of those murders to which it applies.[11] None of the studies has attempted to isolate the effect of the death penalty on

[11] Commentators frequently have explained why the statistical material on the death penalty's deterrent value has until now been inconclusive. See, *e.g.*, S. Rep. No. 93-721, 93d Cong., 2d Sess. 8-11; Royal Commission on Capital Punishment, *supra*, at ¶¶ 62-67; 2 *Working Papers of the National Commission on Reform of the Federal Criminal Laws* 1354 (1970); Gibbs, *Crime, Punishment, and Deterrence*, 48 Sw. Soc. Sci. Q. 515 (1968); Hart, *Murder and the Principles of Punishment: England and the United States*, 52 Nw. U. L. Rev. 433, 457 (1957).

special and highly deterrable capital crime, such as murder for hire. And, perhaps most importantly, all of the studies[12] failed to hold constant factors other than the death penalty that might influence the rate of murders. Only if the death penalty is the sole determinant of the murder rate, or if other determinants are identical in states having different execution rates, would it be proper to infer from these studies that the death penalty has no deterrent effect.[13]

But states—even the contiguous states studied by Sellin—have important differences. Indeed, these very differences may explain why one state chooses to use the death penalty and another does not, and still other differences might have an independent effect directly on the rate of violent crime. Or suppose that a state that had abolished capital punishment also had a high arrest and conviction rate for murder, so that although a murderer would be punished less severely, his expectation of net punishment would be greater in this state than in a state with capital punishment

[12] With the exception of Professor Ehrlich's study, discussed *supra*.

[13] In any event, we do not think that the meaning of the Eighth Amendment should turn on the results of the latest social science research. Neither should it turn on the secular trend in the murder rate, although it could be argued that, if the Court declared the death penalty unconstitutional and the murder rate increased, the increase would be evidence that a deterrent had been removed, and hence that the death penalty would again be constitutional. The alternative, that society would have to accept a higher murder rate because of a mistaken empirical estimate by the judiciary, seems unacceptable.

but a low arrest and conviction rate. Unless factors such as this are held constant—as the most recent study alone has done—no valid conclusions may be drawn. As one opponent of capital punishment has remarked about the previous studies:

> The inescapable flaw is, of course, that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect [from the presence or absence of capital punishment] were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A "scientific"—that is to say, a soundly based—conclusion is simply impossible * * *. [Black, *Capital Punishment: The Inevitability of Caprice and Mistake* 25-26 (1974).]

Even were we to accept the conclusion of the older studies that capital punishment has no observable deterrent effect, that result may have been produced by an entirely practical problem: the real deterrent value of capital punishment may be sufficiently small in relation to the number of murders committed each year that it is difficult to detect, given the deficiencies in data gathering (many crimes are not reported, and changes in the reporting rate are impossible to detect; in some cases it is difficult to determine whether a particular death is a "murder") and the very bulk of the raw data. In recent years there have been more than 15,000 murders per year, so that even

if one execution deterred 10 murders, the effect on the murder rate might become lost in the statistical "noise."

We submit that the states are entitled to make use the death penalty even if the effects are "small" in comparison to the gross murder rate. We do not imply by this argument that the deterrent value of capital punishment is "small" in human terms; every murder is supremely important to the victim and to his or her family and acquaintances. Suppose that a state finds it necessary to impose the death penalty only a few (two, three or four) times yearly on the worst offenders. In all probability the resultant difference in the capital murder rate will be difficult to detect by even the most powerful statistical techniques. Yet the deterrent effect may be real—and the state is entitled to take the measures necessary to save the several lives that would be lost in the absence of the death penalty. A "small" saving in human life is not so insignificant or immaterial that it can be brushed aside as a permissible basis for legislative judgment.

2. *Capital Punishment Reinforces Important Social Values.*

a. *Expression of Moral Outrage.*

Just as the legislature legitimately may conclude that capital punishment deters crime, so it may conclude that capital punishment serves a vital social function as society's expression of moral outrage. Although sometimes capital punishment is authorized

for a crime because society views that crime as serious, the use of capital punishment itself also has an effect on society's view of the crime. Capital punishment marks some crimes as particularly outrageous and offensive, and therefore to be avoided by those individuals with even a trace of social responsibility.[14]

> There is a heavy symbolic significance in the operation of the criminal sanction; for the process of ascribing guilt, responsibility, and punishment goes on day after day against the background of all human history. * * * It is not simply the threat of punishment or its actual imposition that contributes to the total deterrent effect but the entire criminal process, standing as a paradigm of good and evil, in which we are reminded by devices far more subtle than literal threats that the wicked do not flourish. These public rituals, it is plausible to suppose, strengthen the identification of the majority with a value-system that places a premium on law-abiding behavior. [Packer, *The Limits of the Criminal Sanction* 43-44 (1968).]

Moreover, this venting of outrage at the violation of society's most important rules—"retribution" perhaps, although stripped of its vindictiveness—is itself an important, perhaps a necessary, social function, and has been approved by the most respected com-

[14] This effect should be distinguished from deterrence; it achieves obedience to the law's commands not because of the anticipation of punishment but because some individuals will shrink from committing "serious" crimes that strike at the heart of the social order, regardless of the punishment anticipated.

mentators (see, *e.g.*, Packer, *supra*, at 36-37; Royal Commission on Capital Punishment, *supra*, at ¶ 53; Cohen, *Reason and Law* 50 (1950); Hart, *The Aims of the Criminal Law*, 23 L. & Contemp. Prob. 401 (1958)) and by this Court. It is difficult to imagine any social goal other than "retribution" served by the execution of Nazi leaders for war crimes and genocide (cf. *In re Yamashita*, 327 U.S. 1). A criminal justice theory that rested entirely upon deterrence would have been unable to support any punishment whatever for Adolf Hitler, had he been captured, and his chief lieutenants. That example alone should warn against the denigration of "retribution" as a completely legitimate social response to truly heinous crimes.

Although the social cohesiveness function served by "retribution" is not the entire end of criminal punishment, it is not a forbidden end, or inconsistent with our respect for ourselves or the dignity of others. See, *e.g.*, *Williams* v. *New York*, 337 U.S. 241, 248; *Powell* v. *Texas*, 392 U.S. 514, 530-531 (opinion of Marshall, J.). Sometimes nothing less is required to reinforce our respect for ourselves or the dignity of others.[15]

[15] Or as Lord Justice Denning stated to the Royal Commission on Capital Punishment, *supra*, at ¶ 53:

> The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else. * * * The ultimate justification of any punishment is not that it is a deterrent, but

> [W]ithout a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime.

Goodhart, *English Law and the Moral Law* 93 (1953).

Perhaps the mixture of reprobation and expiation known as "retribution" is disapproved by some humanitarian and behavioral theorists, but that theoretical disapproval is utterly inadequate to support a constitutional rejection of a carefully considered and rationally supported legislative judgment.

b. *Dealth is Not Excessive in Relation to All Crimes.*

It has been argued by some that although punishment in general appropriately may be used to deter crimes and express the society's moral outrage over certain crimes, that death is always an excessive device even when applied to these legitimate ends. We submit, however, that capital punishment is not excessive in comparison to all provocations and social needs. The "uniqueness" and finality of the death penalty cut two ways: although death becomes an

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that it is the emphatic denunciation by the community of a crime: and from this point of view, there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty.

especial object of moral concern, it also becomes uniquely appropriate as society's ultimate sanction, all the more appropriate to the "ultimate" crimes because death alone can be the "ultimate" penalty.

To say that death is inevitably excessive because it affronts human dignity, or imposes suffering, is to beg the question. All punishments offend human dignity and impose suffering to some degree; although capital punishment may be harsh, or even repellent to some, it does not follow that it is "excessive":

> [T]here are a number of things we do not wish to think about that are disgusting and perhaps revolting but that we also acknowledge as necessary. Enemas, the vivisection of monkeys, cleaning up outhouses, all are disgusting or abhorrent, but they may also be necessary. Imprisonment is abhorrent—people would find it so if they knew more about it—but it is hardly, in itself, cruel and unusual punishment. [Polsby, *The Death of Capital Punishment? Furman* v. *Georgia*, 1972 Sup. Ct. Rev. 24.]

We do not contend that death is an appropriate response to any crime the legislature might, in an academic hypothetical, be imagined to select, or that it is never excessive in relation to the crime and to alternative methods of punishment. But there are at least some crimes so serious, so qualitatively different from other crimes, that a qualitatively different penalty is called for out of our understanding of the seriousness of the offense. The Eighth Amendment does not bar such a penalty.

> There is one crime for which neither fines nor incarceration may provide an adequate remedy: murder. The cost to the victim is very high, and may indeed approach infinity * * *. * * * Even prolonged incarceration may not impose on the murderer costs equal to those of the victim.

Posner, *Economic Analysis of Law* 364 (1973). At least in relation to murder death is manifestly "proportional" and hence not excessive. And, of course, it is arguably even more appropriate in relation to certain aggravated forms of murder; there are some crimes so heinous that death seems the only appropriate social reply consistent with our beliefs about the seriousness of the offense. Any more "moderate" reply denigrates the seriousness of the crime and the loss to the victims.

3. ***Capital Punishment Incapacitates Dangerous Offenders.***

It is, perhaps, almost too obvious to dwell upon that those who have been executed cannot commit additional capital crimes. Their execution incapitates them and saves the lives of those whom they would have killed if they had been allowed to remain alive.

It has been argued in response that the recidivism rate for murder is low, and that incapacitation therefore is not an adequate justification for capital punishment. Although the premise is correct, the conclusion does not follow. There are some sociopathic individuals who, although not insane by any definition, are so immune to normal forms of social control that

they are quite apt to commit additional murders even if sentenced to life imprisonment without possibility of parole. These individuals can be detected, and, once detected, it should be constitutionally permissible to execute them.

For example, the defendant in *State* v. *Jarrette*, 284 N.C. 625, petition for a writ of certiorari pending, No. 73-6877, was sentenced to a term of imprisonment for two separate murders. While serving that term he escaped and, within two days of his escape, kidnapped and raped a 16-year-old girl and robbed and murdered a 16-year-old boy. We submit that this defendant has sufficiently indicated a proclivity repeatedly to commit heinous offenses so that execution would be justified solely by the need to incapacitate him. Within the federal prison system there are a number of individuals who have been placed into administrative segregation on a continuous basis because, even in the carefully structured prison existence, they are essentially uncontrollable and likely to commit additional violent offenses that might result in death.[16]

We would scarcely argue that the need to incapacitate certain offenders is a good ground for the execution of all offenders. But offenders may by their actions become open to capital punishment under this rationale, perhaps after committing a second mur-

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[16] The Bureau of Prisons holds one individual who has been convicted of killing three people while in prison. No action other than execution (or, perhaps, constant and heavy sedation) can surely prevent him from killing again.

der. In any event, this justification for capital punishment, like the other justifications, does not stand alone. It is cumulative with the others; together, even if not separately, they indicate that legislatures rationally could decide that capital punishment is a necessary response to some crimes. The Constitution requires no more.

B. Capital Punishment Is Accepted by Modern American Society

The best available evidence that the public has not rejected capital punishment lies in the actions of the representatives of that public. Since the decision less than three years ago in *Furman* v. *Georgia*, *supra*, at least thirty-one states (Pet. Br. App. A)[17] and the United States (App. A, *infra*) have enacted statutes providing for the death penalty for at least some crimes, and other states are considering whether to take similar action. Such statutes could not have been enacted in so many states in such a short period of time if our society rejected capital punishment.

This blunt fact cannot be avoided with the contention that elected legislators and chief executives do not necessarily reflect the moral beliefs of the communities they represent. They certainly reflect it more accurately than does the judiciary, which was made independent precisely in order to insulate judges from majority sentiment. The assumption underlying representative democracy is that the legislative

[17] Since petitioner's brief was filed, Virginia has enacted a death penalty for several crimes.

process reflects the will of the people, and that if legislators interpret this will inaccurately new legislators, more sensitive to the public's desires, will be elected and unacceptable laws repealed. Here, petitioners dispute that assumption, and seek an anomalous referendum among judges as a proxy for the "true" will of the electorate. That is not the function of judicial review in our constitutional system.

But the attempt to attack capital punishment by distinguishing between the people and their elected representatives fails on other grounds as well. If the distinction were to be made, the salient difference that appears is that the representatives are better informed than the electorate. The former have had to debate the issue of capital punishment, to listen to the arguments for and against, and have had to confront and make the moral and prudential choices.

Petitioner's object of distinguishing between the society and its representatives, however, is not to prove that the generality of voters are better informed or more "enlightened" morally than their representatives but to suggest, in fact to speculate, that the sentiment of the public, contrary to that of the representatives, may be against capital punishment. That speculation may not properly be entertained by a court reviewing a legislative determination. A court's constitutional function does not encompass guessing what a referendum might show.

If such speculation were relevant, however, what direct evidence there is suggests that the people themselves support the death penalty; there is no social

consensus that the ultimate punishment is barbaric, or even that it is offensive. Far from it—evidence from public opinion polls indicates that popular support for the death penalty has been increasing in recent years and that supporters of capital punishment outnumber opponents by a ratio of two to one. See S. Rep. No. 93-721, 93d Cong., 2d Sess. 13-14 (reprinting polls). Cf. Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 Stan. L. Rev. 1245, 1249 (1974). We do not introduce the results of these polls as a suggestion that the constitutionality of a particular penalty depends on today's straw polls; the interpretation of survey research is a legislative rather than a judicial function. We cite it merely to demonstrate that, even if one proceeded on an incorrect view of the judicial function, the evidence necessary to a judgment against the death penalty is not only absent but contradicted. The polls offer no evidence whatsoever that the public rejects or is revolted by the idea of capital punishment; instead, the public supports the penalty.

There is other and more persuasive evidence of the feelings of the people in general. No defendant may be sent to his death unless he first is convicted by a jury of his peers, and that conviction requires the unanimous vote of twelve.[18] If there were overwhelm-

[18] No state provides for capital juries of less than twelve, and none allows conviction of such an offense by other than unanimous vote. See *Johnson* v. *Louisiana*, 406 U.S. 356; *Apodaca* v. *Oregon*, 406 U.S. 404; *Williams* v. *Florida*, 399 U.S. 78, 89, 103.

ing rejection of the death penalty in the community, juries (which may not be death-qualified, *Witherspoon* v. *Illinois*, 391 U.S. 510) would fail to reach verdicts condemning men to death. But the fact that there have been more than 60 such convictions in less than two years in North Carolina alone demonstrates that this is not so. Some juries may fail to convict; many do convict, unanimously.

The only remaining indicia from which it might be concluded that the death penalty actually has been rejected by society at large is the fact that death in recent years has been imposed on only a small number of those who have committed capital crimes. The argument proceeds to the false conclusion that this demonstrates that public acceptance of the idea of capital punishment is a mirage—that capital punishment is accepted in theory but rejected in fact.

To a great extent the decline in the use of capital punishment in recent years is the effect of judicial activity—of stays forbidding the death penalty pending completion of additional litigation and collateral attacks; of judicial willingness to find in a capital case error that would be unnoticed or "harmless" in another case; of an expanded arsenal of procedural claims available for collateral attack; of the *Furman* decision itself and the Eighth Amendment litigation that preceded it. Such inactivity as has resulted from these causes shows no rejection of the death penalty itself; it shows at most that the criminal justice system is increasingly willing to examine the propriety of a particular death penalty. To the ex-

tent executions have been stayed by the judiciary, the "trend" against capital punishment has been produced by individuals not accountable to the will of the people. Federal judges were afforded life tenure in order to provide insulation from such influences, and it would therefore be inaccurate to interpret judicial queasiness over capital punishment as an expression of the popular will.

To the extent that the decrease in the number of deaths by execution in recent years has been the result of legislative or executive activity, it is consistent with explanations other than "rejection" of the use of death as an instrument of social policy:

> To be sure, the penalty of death is infrequently imposed. An entirely valid inference from this bare fact would be, not that the society has repudiated the penalty, but that it wishes to preserve its use to a small number of cases. A reluctance to impose a penalty is not necessarily the same as its repudiation. Reluctance may spring from moral revulsion; but it may just as commonly proceed from a humane and heartfelt sorrow.

Polsby, *supra*, at 20. A reverence for the importance of human life may explain a thoroughly considered (and entirely acceptable) social policy to limit to a minimum the number who must be put to death, while reserving that extreme penalty to a few extreme cases. Perhaps, alternatively, reserving the sanction to a few "exemplary" cases, sparing others who might be "eligible" to die but whose deaths would

add little to whatever social goals can be served by some lesser number of executions. The Constitution ought not to be read to compel the state to engage in mass executions in order to preserve the power to execute anyone at all.

C. Differences of Opinion Concerning the Propriety of the Death Penalty Must Be Resolved in Favor of the Legislative Judgment

We have suggested that the cruel and unusual punishments clause of the Eighth Amendment, understood in its historical context, properly is interpreted as a device for enforcing the overwhelming social consensus of the times, and properly may be used to curb excesses arising when isolated individuals (or legislatures), through ignorance or malice, flaunt those standards and create or impose punishments utterly unacceptable to society and degrading to society's dignity. This statement of the scope of the amendment carries with it a statement about the limits of judicial review. A punishment is not "cruel and unusual" unless utterly outside the bounds of social tolerance.

The bases of support for capital punishment that we have discussed above suggest that, wherever the bounds of social tolerance may be, they are not exceeded by capital punishment. It is approved by many legislatures, and imposed by numerous unanimous juries. It is supported by substantial majorities in opinion polls. It is not excessive when compared to crimes such as murder. There is room for legislative debate and honest difference of opinion concerning

whether it deters others and expresses legitimate social approbation of heinous deeds.

The careful balance of considerations supporting the death penalty against the moral or humane concerns of those who oppose death perhaps accounts for the great debate capital punishment has generated throughout the history of this country.[19] It has been a subject of debate since the founding of the republic (see, *e.g.*, Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania* (1793)), and the debate bids well to continue. It has been a subject of intense debate precisely because there is much to be said on each side, and because neither proponent nor opponent, in a legislative setting, has any argument that must convince all logical men of that side's validity.

Even if the cruel and unusual punishments clause were not limited to enforcing a social consensus that has broken down in an individual case, the propriety of the death penalty would not be a proper subject for judicial scrutiny. The death penalty is rationally supported and rationally supportable: reasonable men can and do disagree about the merits of capital pun-

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[19] What better evidence of the equipoise of the debate, and consequently of the validity of legislative choice, than this concession by petitioner (Pet. Br. 118-119): "The opposition to capital punishment * * * has been vigorously asserted on the basis of 'fundamental moral and societal values in our civilization and in our society.' Proponents of the death penalty have responded with equal moral fervor. Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument" (footnotes omitted).

ishment, but reasonable men cannot say that no reasonable man would support the death penalty. Because the evidence and the moral concerns are so balanced, the Court cannot conclude that the legislatures and juries have made such a "clear mistake" (cf. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893)), that their considered deliberations must be disregarded and the law set aside. Or, as Judge Learned Hand put the matter, when dealing with an amendment that grew out of the seventeenth century procedural victories of Parliament over the Crown:

> [I]n such cases I cannot see why courts should intervene, unless it appears that the statutes are not honest choices between values and sacrifices honestly appraised.

Hand, *The Bill of Rights* 66 (1958). Just as when social welfare or economic legislation is assailed on due process grounds, it "always has been necessary to distinguish between the frontiers of another 'Department's' authority and the propriety of its choices within those frontiers" (*id.* at 29-30).

There are in this area no clear mistakes by the legislature. A given legislature may be "mistaken" in applying capital punishment to a given crime, and, indeed, there seems to be no way to exclude the possibility that an omniscient observer would conclude that all legislatures were mistaken in believing that capital punishment is ever appropriate. But the data such an omniscient observer would use, and the standards he would apply when weighing the moral

values implicated in the death penalty, are beyond the ken of courts and perhaps beyond the ken of mankind. There are no neutral principles by which the death penalty may be condemned; there is nothing more than a belief that the legislature, after consideration of weighty policy considerations on both sides, may have chosen the "unwise" course. That is not enough. Courts

> are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches us that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.
>
> Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as those now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. * * * Beyond these powers we must not go; we must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us.

Dennis v. *United States*, 341 U.S. 494, 525-526 (Frankfurter, J., concurring).

III. CAPITAL PUNISHMENT MAY BE IMPOSED UNDER THE CRIMINAL JUSTICE SYSTEM'S PRESENT PROCEDURES. EACH PROCEDURE IS EITHER REQUIRED OR PERMITTED BY THE CONSTITUTION ITSELF

Petitioner devotes much of his brief (Pet. Br. 42-101) to the argument that the procedures for processing capital cases are arbitrary and capricious. Petitioner objects to the discretion involved in the prosecutor's decision to charge, in plea bargaining, in the jury's determination of guilt and in executive clemency. This "elaborate argument * * * does not need an elaborate answer." [20] Petitioner obviously does not contend for a system in which the prosecutor must charge a capital offense whenever there has been a killing, in which the defendant could not plead to a lesser offense, in which the jury must convict, in which clemency could not be exercised. We would then have the rule of the Tyrant which ancient Greece replaced with the rule of law millenia ago. The generalization that the death penalty always violates the Eighth Amendment can be made *only* because the discretion petitioner finds objectionable will be inevit-

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[20] Mr. Justice Holmes, in *United States* v. *Wurzbach*, 280 U.S. 396, 399.

able so long as we have a constitutional system of criminal justice.[21]

Indeed, it is strange that petitioner even frames his procedural argument in terms of the Eighth Amendment. One would have supposed that if the evil is in the process, the remedy is in the command that no person may be "deprived of life * * * without due process of law." That of course was the argument in *McGautha* v. *California*, 402 U.S. 183, 207, with respect to jury discretion, and the Court rejected it. To cast the same argument differently and say that the Eighth Amendment proscribes some unattained and unattainable system for processing capital cases is to contend that this constitutional provision contains its own refutation. The Eighth Amendment cannot mean that, although the death penalty is a permissible type of punishment, it can never be imposed under our criminal justice system because the

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[21] In regard to prosecutorial discretion, petitioner points out that it is "*necessarily* and *unavoidably* arbitrary" (Pet. Br. 53) (emphasis changed).

In regard to plea bargaining, petitioner notes that the acceptance of pleas to lesser offenses "is doubtless inevitable" (*id.* at C1).

In regard to the exercise of discretion by the jury, petitioner does not impugn the jurors' integrity but only "acknowledge[s] that they are human" (*id.* at 75) and that there is an "inevitable propensity" for juries to alleviate the harshest of penalties (*id.* at 91-92).

In regard to executive clemency, petitioner appears to recognize that the very concept encompasses discretion (*id.* at 95-96). See *Schick* v. *Reed*, No. 73-5677, decided December 23, 1974.

system cannot, should not, be altered to meet petitioner's objections to it. Yet (unless we misapprehend his position) that is what petitioner would have this Court rule.

Petitioner states that he is not suggesting "that the selective discretion present at any of the separate stages of the criminal process would be constitutionally objectionable in a non-capital case" (Pet. Br. 100-101). With all respect, we submit that he is suggesting just that. There is not a single argument petitioner puts forward in this section that could not equally be made in regard, for example, to the penalty of life imprisonment for first-degree murder. Petitioner summarizes his argument by stating that the "procedure for processing capital cases involves a series of uncontrolled discretionary judgments that operate to spare the lives of some defendants while others in similar circumstances are sentenced to die" (Pet. Br. 15). If the Court accepts that proposition as the basis for striking down the death penalty, how can the Court hold unobjectionable the "procedure for processing criminal cases which involves a series of "uncontrolled" discretionary judgments that operate to spare the liberty of some defendants while others in similar circumstances are sentenced to imprisonment"?

Petitioner's analysis begs the question whether the difference in penalty is a constitutional difference. If a state properly can prescribe the death penalty for at least some crimes, as we have argued above, then it is impossible to turn to the Eighth Amendment as

a source of a constitutionally-supported principle that this difference in the penalty imposed requires a difference in the process used. Perhaps one could argue that for due process purposes death is different because more serious, and that the process that is "due" for crimes with less severe sanctions is insufficient for more serious ones. But petitioner has eschewed this course and, as we noted above, a similar due process argument failed to persuade the Court in *McGautha*.

Since a conclusion by this Court that the procedures of the criminal justice system are too discretionary will inevitably impugn those procedures in regard to penalties other than death, claims of that nature properly should be consigned to particular allegations against particular areas of discretion, rather than to an overall, and therefore less-well-focused, inquiry. Thus, for example, petitioner contends (Pet. Br. 67-89) that capital crimes are so vaguely defined that a jury sometimes will have difficulty ascertaining when one has been committed. But, of course, this is not always so. There is no difficulty in the definition of murder by lying in wait, or by poison; there is little difficulty in the definition of murder for hire or in the course of a kidnapping. The definitional difficulties in other forms of murder are more considerable: premeditation and malice aforethought invite consideration of a sometimes elusive element of intent.

But if there is to be a vagueness-type challenge to a particular definition (see, *e.g.*, *Grayned* v. *City of Rockford*, 408 U.S. 104), it is a challenge potentially

available to one whose conduct is within the zone of uncertainty, not one whose conduct is clearly prohibited. *Parker* v. *Levy*, 417 U.S. 733; *United States* v. *Harriss*, 347 U.S. 612, 618. The assertion that some capital statutes are vague as applied to crimes committed by other individuals is an inadequate foundation for petitioner's contention that capital punishment itself inevitably is arbitrarily or capriciously imposed.[22]

For the foregoing reasons, we believe petitioner's procedural contention must be rejected. We are however, somewhat hesitant to conclude our discussion of the matter at this point. The discretion inherent in our system of criminal justice may need no defense, but it serves such important goals that further elaboration is, we believe, appropriate.

A. Discretion in the Criminal Justice System Serves Important Social Functions

The need for some discretion in a system of criminal justice arises because the varieties of human endeavor are endless and unpredictable. The variety

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[22] It would be more appropriate to tender more narrow challenges to other sources of discretion in the criminal justice process as well. Many of the points of choice discussed by petitioner could be altered to produce more predictable and uniform decisions in response to particularized complaint. See, *e.g.*, Ark. Stat. Ann. 41-4714 (1973 Cum. Supp.) (governor must give reasons for commuting death sentence); Ill. Rev. Stat. ch. 38, section 1005-8-1A (1974 Cum. Supp.) (prosecutor must seek death when aggravating circumstances appear); N.Y. ch. 367, section 10 (1974 Legis. Assembly, May 6, 1974) (defendant may not plead guilty to a capital crime).

of the circumstances of offense and offender is so great that it cannot usefully be anticipated in a single criminal statute. Nor, for that matter, is our language sufficiently precise to enable legislation to account for these differences, even if all could be anticipated. Perhaps it approaches the limit of human abilities to specify some reasonably clear criteria that mark off those whose crimes are sufficiently serious that capital punishment is "authorized," and to rule that for at least some of those for whom it is authorized, it is also appropriate.

In the formative years of this country most statutes providing for the death penalty were "mandatory;" all convicted under them were sentenced to death. For the reasons discussed in this Court's decision in *McGautha*, *supra*, 402 U.S. at 196-208, this procedure was unsatisfactory because these statutes selected some men who did not merit the ultimate penalty—depending on the reaction of the jury, such individuals unjustly might be sent to death, or they might be acquitted entirely as the jury, acting as the conscience of the community, refused *despite* the evidence to convict a man whom they believe should not be executed. The conscious decision to extend to the jury the ability to do openly what it had been forced to do covertly was one of the major advances of American criminal justice:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. [*McGautha*, *supra*, 402 U.S. at 204.]

Nevertheless, in response to this Court's decision in *Furman*, those states that have reenacted death penalty statutes have attempted to structure and confine the discretion available to the sentencing authority. One course, adopted by North Carolina, eliminates sentencing discretion entirely. Another course, adopted by the United States (see App. A, *infra*), enumerates those aggravating characteristics without which no crime is "capital." [23] This, in turn (petitioner asserts) simply transfers the exercise of discretion to other locations in the criminal justice system. Even if we were to agree with this premise, the conclusion that the death penalty is unconstitutional does not follow, for we believe that *McGautha* correctly concluded that some discretion is permissibly a part of the process of determining who is to be executed. Cf. *Winston* v. *United States*, 172 U.S. 303 (attempt to limit jury discretion in capital case impermissible).

One objective of modern criminal justice is to tailor the punishment, at least to some extent, to the of-

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[23] See Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1699-1712 (1974), for a more complete typology of the post-*Furman* statutes.

fender as well as to the offense. We assume that petitioner would not embrace a rule that legitimated capital punishment only when it followed automatically and without variation from the mere fact of an offense described in the broadest possible terms—that alternative has been rejected (without the need for constitutional compulsion) by the states. Still less can it be said that the Constitution *requires* that all offenders equally receive terms of life imprisonment (although we do not deny the legislatures' power to make that choice, too). Despite the superficial uniformity of such a course, there is real inequality in treating identically individuals who are different in essential characteristics and who have committed crimes factually dissimilar, even though language and human forethought are inadequate to commit those differences to expression in the form of "rules." And, if the Constitution admits of any discretion in this fashion, the discretion currently present in the criminal justice system is not so excessive or unprincipled that its mere presence as a means of administering mercy precludes the imposition of any capital punishment whatsoever.

B. Each of the Particular Sources of Discretion in the Criminal Justice System Is Either Permitted or Compelled by the Constitution Itself

Petitioner attacks the discretion now possessed by prosecutors (in conjunction with the grand jury) to decide whom to charge and with what crime; the discretion of prosecutors (in conjunction with the court) to accept a plea to a lesser and non-capital offense;

the power of a jury to avoid a conviction that sends a defendant to his death either by acquitting in spite of the evidence or by convicting of a lesser included (and non-capital) offense; and the power of the executive to grant clemency. We submit that the discretion possessed by each of these actors serves important goals of criminal justice, and for that reason has been upheld by this Court as consistent with the Constitution. Moreover, several of the sources of discretion are the result of specific constitutional commands, and any attempts to confine or eliminate the discretion would be unconstitutional. Because each of these sources of discretion is either permitted or encouraged by provisions in the Constitution other than the Eighth Amendment, the product (the sentence) of this fully acceptable process cannot itself violate the Constitution.

1. The Charging Decision.

A federal prosecutor has an unfettered power to decline to bring charges against any individual. The prosecutor need not seek an indictment, and under Fed. R. Crim. P. 7(c) the United States Attorney may, by declining to sign an indictment, prevent prosecution of a case in which the grand jury has concluded that there is good ground to prosecute. See *United States* v. *Cox*, 342 F. 2d 167 (C.A. 5), certiorari denied *sub nom. Cox* v. *Hauberg*, 381 U.S. 935; *In re Grand Jury January, 1969*, 315 F. Supp. 662 (D. Md.). But this prosecutorial power is to a large extent created by the Constitution itself; it inheres in the separation of the executive function from the

judicial function. Both the executive and judicial branches have independent power, not subject to control by the other, over the course of such proceedings. *The Confiscation Cases*, 7 Wall. 454; *Georgia* v. *Mitchell*, 450 F.2d 1317 (C.A.D.C.); *Powell* v. *Katzenbach*, 359 F.2d 234 (C.A.D.C.), certiorari denied, 384 U.S. 906 (collecting cases). Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614.

The prosecutor's discretion not to commence criminal prosecution is thus part of our constitutionally-created system of government. It is, of course, conceivable that in particular circumstances prosecutorial discretion will be abused and slanted along racial lines (see, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Littleton* v. *Berbling*, 468 F.2d 389 (C.A. 7), vacated on other grounds *sub nom. Spomer* v. *Littleton*, 414 U.S. 514) or other impermissible grounds. When that happens independent remedies are available. However, the prosecutorial discretion, which is a product of the Constitution itself, does not produce unconstitutional results merely because the prosecutor has no precise set of rules that control his prosecutorial decisions. "[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles*, 368 U.S. 448, 456.

The prosecutor is under a duty—indeed, a constitutional duty—not to charge and prosecute an individual unless the prosecutor legitimately believes that the individual can be convicted. The evaluation of that probability of conviction is a difficult one, involving an assessment of the evidence available, the predilections of witnesses, and the possibility that the jury (the composition of which is unknown) will agree with the prosecutor's evaluation. All of these factual inferences must then be analyzed against the available categories of crime that may be comprehended in a single criminal transaction, and a decision made about which prosecution would be most likely to succeed and would be most advantageous to the public welfare if successful. Finally, the prosecutor must evaluate the resources of his own office; because manpower is limited in relation to the number of crimes that have been committed, decisions sometimes must be made to forego particular borderline prosecutions, even though there is a reasonable chance of conviction, in order to concentrate prosecutorial efforts where they may be more urgently needed.

In many civil law countries prosecutors are under a duty to prosecute all major crimes known to them. See Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 439 (1974); Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 468 (1974). Even within these compulsory prosecution systems the prosecutor remains free to evaluate the evidence; prosecution is commenced only when there is "a sufficient factual basis."[24] Moreover, the logic of compulsory prosecution is more compelling in an inquisitorial (rather than adversarial) system of criminal justice. In the inquisitorial system the court

[24] Federal Republic of Germany, Code of Criminal Procedure 152(2).

itself has substantial factfinding and prosecutorial functions; the "prosecutor" is simply an instrument to commence the process, placing further proceedings in the hands of the investigating magistrate. Restriction of prosecutorial discretion is a necessary facet of a system structured around an inquisitorial magistrate, and is simply an allocation of discretion to the magistrate rather than the prosecutor. It certainly is not, at all events, a discretion-free system. Herrmann, *supra*, at 474-503.

2. *Plea Bargaining.*

Although (unlike federal charging discretion) plea bargaining has not been established by the Constitution itself, it is nevertheless an essential part of our system of criminal justice and has received the approval and encouragement of this Court. *Brady* v. *United States*, 397 U.S. 742, 752-753; *Santobello* v. *New York*, 404 U.S. 257, 260. Like the other forms of discretion present in the criminal justice system and assailed by petitioner, plea bargaining reduces the potential punishment a defendant may suffer; it never operates to increase the maximum punishment. Moreover, unlike other forms of discretion, plea bargaining operates only with the acquiescence (and usually at the behest) of the accused and works to the accused's advantage. Were it otherwise, the accused would not enter into the plea arrangement. It is difficult to understand how this procedure, operating with the permission of the accused and for his benefit, can cause the penalty received by those who

do not enter into such bargains to be unconstitutional.

The most difficult question raised by plea bargaining is, petitioner asserts, the failure of the prosecutor to enter into such bargains with some defendants, thereby depriving those defendants of an opportunity to escape the death penalty.[25] Perhaps a prosecutor might make such a decision for improper motives; in all probability, if such motives could be shown, the procedure would be vulnerable. Cf. *Littleton* v. *Berbling*, *supra*. But petitioner has not even alleged (let alone adduced proof) that such a practice exists in North Carolina. If a prosecutor were bending his actions in a forbidden manner, it would at most impugn the acts of the prosecutor, and not be an argument against the constitutionality of all death penalties everywhere. Cf. *United States* v. *Bell*, 506 F. 2d 207, 221-222 (C.A.D.C.). And, of course, the failure of a prosecutor to accept a plea arrangement suggested by an accused does no more than cause the accused to stand trial—it is simply a failure to relieve a defendant of the burden properly placed on him by the indictment charging a capital offense. Once a prosecution has begun, its continuation is within the control of the court, and discretion in plea bargaining may then be controlled judicially. See, *e.g.*, *United States* v. *Ammidown*, 497 F.2d 615 (C.A.D.C.); proposed amendment to Fed. R. Crim. P. 11(e) (transmitted to Congress April 22, 1974, 416 U.S. 1008-1009). If plea arrangement proce-

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[25] Petitioner has not claimed that he offered to plead guilty to a lesser charge and that this request was refused.

dures are seriously defective, the proper cure is their improvement, rather than the invalidation of the death penalty for those who do not enter into such arrangements.

3. *Jury Nullification.*

The power of the jury to acquit despite evidence justifying conviction is a power created and protected by the Constitution itself. The Sixth Amendment confers an unquestioned right to a jury trial (*Duncan* v. *Louisiana*, 391 U.S. 145) and that right, in turn, secures to a jury the power to acquit even those whom some all-knowing observer would say were guilty beyond a reasonable doubt. The jury's function as the "conscience of the community" (*Witherspoon* v. *Illinois*, *supra*, 391 U.S. at 519) is best served when it considers all of the important facets of the crime, including the culpability of the defendant as well as the fact of his legal guilt. See Scheflin, *Jury Nullification: The Right to Say No*, 45 S. Calif. L. Rev. 168 (1972).

On the other hand, the power of a jury to acquit despite the evidence (or to convict of a lesser included offense although the evidence supports the greater offense) is not an exercise of standardless discretion as was the jury's power to recommend, after conviction, whether a defendant shall be sent to death. The jury's power to nullify is a power, but not an authorization. It is a power because society uses no sanctions to deter it. It is a power because the Constitution allows juries to convict or acquit, and establishes no external standards by which

an acquittal may be called "improper;" the fact-finding power is lodged in the jury and when it acquits, what it finds to be "true" *is* true within the boundaries of the legal system. But the power of juries to do these things is not unbridled. There are standards to guide the exercise of that power. The judge carefully instructs the jury on the law, and informs jurors how they should respond to the facts they have found. The jury is told that if they have a particular view of the facts, they should take a specific action. They are not told that if they have found (for example) that the accused committed a killing for hire they may convict of first degree murder, second degree murder, or acquit; they are told, instead, that they should convict of first degree murder. There are multiple standards to guide the jury's decisions; the jury has "discretion" only in the sense that it has the power to disregard these directions.[26]

The potential vice of jury nullification, even though its availability is created by the Constitution, is that the jury may acquit in an irrational or prejudicial manner. However, the constitutional guarantee of a jury trial rests on the assumption that the jury is not animated by bias, and that the jury is capable responsibly of discharging its duties. If the jury is given to caprice, it would undermine convictions for

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[26] If the instructions given to the jury are vague or defective, the proper recourse is either a claim that the statutes defining the crimes are unconstitutionally vague (see pp. 57-58, *supra*) or a claim of simple error in framing the charge.

any crime no less than convictions for capital crimes. But this Court has always assumed that, at least when screened from prejudicial pressures and from legally inadmissible but "powerfully incriminating extrajudicial statements" (*Bruton* v. *United States*, 391 U.S. 123, 135), the jury can be trusted to decide the controversy reasonably, conscientiously, and intelligently. See *McGautha, supra.* Cf. *Duncan* v. *Louisiana, supra,* 391 U.S. at 157.

The argument that juries will act unfairly and arbitrarily assumes that, on this most serious decision, twelve jurors who have been carefully screened by defense counsel will silently cast their votes for private reasons without reference to the commands of the law. The available evidence is to the contrary. Professors Harry Kalven, Jr. and Hans Zeisel, in preparing their massive study, *The American Jury* (1966), analyzed in depth the workings of more than 3,500 jury trials, and concluded that in the great majority of cases in which the jury has declined to convict (whether or not of a capital offense) when the evidence apparently is persuasive, the jury is making a reasoned and reasonable response to the excessiveness of a penalty in light of the nature of the crime and the circumstances of the defendant. The authors uncovered no evidence that the jury was behaving capriciously in these instances of "nullification" (*id.* at 306-312). And when either the judge or jury had available both a capital disposition and a noncapital disposition the judge and jury agreed in a remarkable number of cases—81 percent. In those

cases in which there was disagreement the authors could find a rational basis for that disagreement in all but two cases (*id.* at 445). Perhaps most significantly, a clear pattern of aggravation of the worst sort marked those cases in which judge and jury agreed that a death penalty was appropriate.[27]

> The cases in which jury and judge agree that the defendant should pay for his crime with his life are marked for the most part by peculiar heinousness. In many, a clear pattern emerges; there is an aspect of almost gratuitous violence. [*Id.* at 437.]

The other major recent study of the workings of the modern jury system was conducted by the Stanford Law Review. See Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases: Standardless Sentencing*, 21 Stan. L. Rev. 1297 (1969). Although that study confined its attention to the penalty phase of sentencing by juries that had convicted the defendant, it, too, sheds some light on the rationality of the jury. The authors of the study analyzed 178 separate variables that might have entered into the penalty decision in each of the 238 cases studied. The results, apparently to the surprise of the student editors, showed that there *are* "definite patterns of jury decisionmaking, precluding the possibility that juries make their decisions wholly at random" (*id.* at 1419). The editors concluded that

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[27] Whether because the jury could determine the sentence or because the jury could convict of a noncapital lesser included offense—in either case without standards or guidelines.

even without standards presented by the judge, the California juries reached conclusions astonishingly similar to those that would have been produced by an "objective" observer applying the aggravating/mitigating criteria proposed by the Model Penal Code (*id.* at 1429).

The editors also concluded that there was no evidence whatsoever that juries based their decisions on irrational or illegal standards such as race (*id.* at 1346, 1366-1367, 1417-1420). Finally, as Professor Kalven noted in his forward to the study, the jury sentenced the defendant to death in 103 of the possible 238 cases (hardly a "freakish" or trivial imposition), and he questioned the study's sole indication of bias, its hint that juries might have been guided in part by the social status of the accused. On the basis of his years of experience with the American jury, Professor Kalven commented: "I am not persuaded that this is an expression of simple class bias and not a reflection of a more subtle concern with personality and character" (*id.* at 1301).

We submit that there is simply no evidence that the jury, when deciding whether to convict in capital cases, acts in a wanton or freakish or discriminatory manner. The jury is fulfilling a function given to it by the Constitution itself; more is needed than petitioner's groundless speculation that the jury might act irrationally to demonstrate that the Constitution's guarantee of trial by jury is a bar to the imposition of capital punishment.

4. *Lesser Included Offenses.*

Most of the arguments we have made above with respect to juries also apply to the function of juries as they consider conviction for lesser included offenses. There is no evidence that juries act in a freakish manner; petitioner's assertion of the potential for such action does not establish that such arbitrary behavior occurs.

Moreover, the Sixth Amendment's right to trial by jury includes within it a constitutional right to have the jury consider any lesser included offenses to the major charge. When the defendant controverts any element of the charge (and defendant's assertion, if correct, would entitle him to conviction on a lesser charge) he is entitled to have that charge put to the jury so that it can exercise its constitutional fact-finding function. *Berra* v. *United States*, 351 U.S. 131, 134; *Stevenson* v. *United States*, 162 U.S. 313. This does not mean, of course, that a defendant is required to accept such a charge; he or she is entitled to submit the case to the jury on the counts of the indictment in the expectation (or hope) of a complete acquittal. And, under federal law, a defendant is not entitled to a lesser included offense instruction unless there is some evidence that would support conviction of that charge.[28] *United States* v. *Bishop*, 412

[28] Petitioner contends that in North Carolina a lesser included offense instruction may be given even though there is no evidence to support the lesser offense (Pet. Br. 77-80). However, we do not consider this further because it does not apply to the federal system and is not, in any event, an avenue

U.S. 346, 361; *Sansone* v. *United States*, 380 U.S. 343, 350.

There is thus no evidence that juries use their ability to convict of a lesser included offense in a capricious manner. Their ability to convict of a lesser included offense is in any event created by the Sixth Amendment itself. Petitioner's claim regarding the opportunity for discretion does not make capital punishment invariably cruel and unusual.

5. *Clemency.*

We return here to a now familiar theme. At least in the federal system the President's ability to pardon or grant clemency on such terms as he thinks fit is established by the Constitution itself, and thus shielded from legislative or judicial constraint. *Ex parte Garland*, 4 Wall. 333, 380; *Schick* v. *Reed*, No. 73-5677, decided December 23, 1974. As Hamilton explained in the 74th *Federalist*:

> Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenence too sanguinary and cruel. [p. 473 (Wright ed. 1961).]

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of inherent or inescapable discretion. If it is excessively standardless, it may be assailed directly in an appropriate case.

In *Schick* this Court concluded that the pardoning power of the President flows from the Constitution alone and therefore may be exercised by him at his will without regard to a need for consistency of decision. "The very essence of the pardoning power is to treat each case individually" (slip op. at 10). "Individual acts of clemency inherently call for discriminating choices because no two cases are the same" (*id.* at 12). Because the executive power to grant clemency is unfettered and unfetterable, it cannot logically follow that it is unconstitutional to treat in accordance with a court's judgment those whom the executive declines to pardon.

C. All Discretion Taken Together Does Not Prevent the Death Sentence From Being Validly Imposed

The net effect of the instances of discretion in the criminal justice system is no greater than the sum of its parts. Petitioner's argument is that the Constitution affirmatively provides (or at least permits) so many avenues of escape from death, so many rights the defendant can invoke, and so many opportunities for mercy, each designed expressly to shield an accused from unjust conviction or punishment, that only an arbitrarily or freakishly selected few of those who "really deserve" death escape the net of safeguards against injustice. Then, the argument concludes, it must be unjust to punish those remaining who have not been spared, even though they deserve their fate.

The Constitution does not impose this incredible result on the criminal justice system. Those whose

execution is not averted by one of the avenues of discretionary mercy or constitutional safeguard have been sent to their death because none of a large number of actors thought they deserved to be spared. Such a procedure is the opposite of arbitrariness. It is instead a decision by consensus—only by unanimous agreement of the grand jury, the prosecutor, the judge, the jury (itself unanimous), and the clemency authority may death be imposed.[29] There is nothing in the Eighth Amendment (or in the Due Process Clause) that precludes such action by consensus. And there is no justification for reaching a conclusion that the combination of provisions, each of constitutional origin, granting discretion to a number of actors, inevitably renders the criminal justice system incapable of producing a constitutional sentence.

In the last analysis petitioner is seeking to convince this Court that the Eighth Amendment cannot

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[29] In the Due Process Clause the framers ensured that the risk of the execution of an innocent man would be held to a minimum. Because the Framers themselves authorized capital punishment (1 Stat. 112) and because, as we have argued, the Eighth Amendment does not forbid that type of punishment for crime, the framers expressed their belief that the benefits of capital punishment—including protecting the lives of innocent people by deterring murders—outweigh whatever very slight risk there may be of an unwarranted execution. This Court has scrutinized capital cases carefully in order further to minimize that risk. The safeguards and avenues of discretionary mercy we have discussed in this part of the brief stand as a bulwark against the possibility of error that could produce an unjustified execution and, because of the evolution of stronger safeguards in the criminal justice system, it is much less likely today than it was at the time of the framers that such errors will be made.

coexist with the Fifth and Sixth Amendments, because procedures either compelled or permitted by those amendments, and by other provisions of the Constitution, invariably produce a result intolerable under the Eighth Amendment. But the Constitution is not an instrument so inconsistent within itself that the commands of one amendment nullify the commands of others.

When each step in the process is constitutionally permitted, indeed in many instances compelled, when all that the Constitution required to be done was done, when nevertheless the resulting penalty, although not of a type forbidden, is then claimed to be unconstitutional *because* of the process followed in imposing it —in short, when the foundation of petitioner's argument is exposed, the conclusion built upon it must fall. The course chosen by at least 31 states and the United States since *Furman* should not be nullified by this Court.

CONCLUSION

The United States submits that capital punishment is not *per se* unconstitutional.

Respectfuliy submitted.

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MARCH 1975.

APPENDIX A

The Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409, amending 49 U.S.C. 1472, provides in relevant part:

"AIRCRAFT PIRACY OUTSIDE SPECIAL AIRCRAFT JURISDICTION OF THE UNITED STATES

"(n)(1) Whoever aboard an aircraft in flight outside the special aircraft jurisdiction of the United States commits 'an offense', as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, and is afterward found in the United States shall be punished—

"(A) by imprisonment for not less than 20 years; or

"(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.

"(2) A person commits 'an offense', as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft when, while aboard an aircraft in flight, he—

"(A) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or

"(B) is an accomplice of a person who performs or attempts to perform any such act.

"(3) This subsection shall only be applicable if the place of takeoff or the place of actual

landing of the aircraft on board which the offense, as defined in paragraph (2) of this subsection, is committed is situated outside the territory of the State of registration of that aircraft.

"(4) For purposes of this subsection an aircraft is considered to be in flight from the moment when all the external doors are closed following embarkation until the moment when one such door is opened for disembarkation, or in the case of a forced landing, until the competent authorities take over responsibility for the aircraft and for the persons and property aboard.".

(c) Subsection (o) of such section 902, as so redesignated by subsection (b) of this section, is amended by striking out "subsections (i) through (m)" and inserting in lieu thereof "subsections (i) through (n)".

SEC. 104. (a) Section 902(i)(1) is the Federal Aviation Act of 1958 (49 U.S.C. 1472(i)(1)) is amended to read as follows:

"(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

"(A) by imprisonment for not less than 20 years; or

"(B) if the death of another person results from the commission or attempted commission of the offense, by death or by imprisonment for life.".

(b) Section 902(i) of such Act is further amended by adding at the end thereof the following new paragraph:

"(3) An attempt to commit aircraft piracy shall be within the special aircraft jurisdiction of the United States even though the aircraft is not in flight at the time of such attempt if the aircraft would have been within the special aircraft jurisdiction of the United States had the offense of aircraft piracy been completed.".

SEC. 105. Section 903 of the Federal Aviation Act of 1958 (49 U.S.C. 1473), relating to venue and prosecution of offenses, is amended by adding at the end thereof the following new subsection:

"PROCEDURE IN RESPECT OF PENALTY FOR AIRCRAFT PIRACY

"(c)(1) A person shall be subjected to the penalty of death for any offense prohibited by section 902(i) or 902(n) of this Act only if a hearing is held in accordance with this subsection.

"(2) When a defendant is found guilty of or pleads guilty to an offense under section 902(i) or 902(n) of this Act for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in paragraphs (6) and (7), for the purpose of determining the sentence to be imposed. The hearing shall not be held if the Government stipulates that none of the aggravating factors set forth in paragraph (7) exists or that one or more of the mitigating factors set forth in paragraph (6) exists. The hearings shall be conducted—

"(A) before the jury which determined the defendant's guilt;

"(B) before a jury impaneled for the purpose of the hearing if—

"(i) the defendant was convicted upon a plea of guilty;

"(ii) the defendant was convicted after a trial before the court sitting without a jury; or

"(iii) the jury which determined the defendant's guilt has been discharged by the court for good cause; or

"(C) before the court alone, upon the motion of the defendant and with the approval of the court and of the Government.

"(3) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in determining the existence or the nonexistence of the factors set forth in paragraph (6) or (7). Any information relevant to any of the mitigating factors set forth in paragraph (6) may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but this admissibility of information relevant to any of the aggravating factors set forth in paragraph (7) shall be governed by the rules governing the admission of evidence at

criminal trials. The Government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in paragraph (6) or (7). The burden of establishing the existence of any of the factors set forth in paragraph (7) is on the Government. The burden of establishing the existence of any of the factors set forth in paragraph (6) is on the defendant.

"(4) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the factors set forth in paragraph (6) and as to the existence or nonexistence of each of the factors set forth in paragraph (7).

"(5) If the jury or, if there is no jury, the court finds by a preponderance of the information that one or more of the factors set forth in paragraph (7) exists and that none of the factors set forth in paragraph (6) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the aggravating factors set forth in paragraph (7) exists, or finds that one or more of the mitigating factors set forth in paragraph (6) exists, the court shall not sentence the defendant to death but shall impose any other sentence provided for the offense for which the defendant was convicted.

"(6) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict

as provided in paragraph (4) that at the time of the offense—

"(A) he was under the age of eighteen;

"(B) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution;

"(C) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;

"(D) he was a principal (as defined in section 2(a) of title 18 of the United States Code) in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

"(E) he could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing death to another person.

"(7) If no factor set forth in paragraph (6) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in paragraph (4) that—

"(A) the death of another person resulted from the commission of the offense but after the defendant had seized or exercised control of the aircraft; or

"(B) the death of another person resulted from the commission or attempted commission of the offense, and—

"(i) the defendant has been convicted of another Federal or State offense (committed either before or at the time of the commission or attempted commission of the offense) for which a sentence of life imprisonment or death was imposable;

"(ii) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment (committed on different occasions before the time of the commission or attempted commission of the offense), involving the infliction of serious bodily injury upon another person;

"(iii) in the commission or attempted commission of the offense, the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense or attempted offense; or

"(iv) the defendant committed or attempted to commit the offense in an especially heinous, cruel, or depraved manner.".

APPENDIX B

The Department of Justice has supported proposals to amend the federal criminal laws to reintroduce a death penalty in certain carefully circumscribed circumstances. During the most recent session of Congress S. 1401 was reported favorably by the Senate Committee on the Judiciary. See S. Rep. No. 93-721, 93d Cong., 2d Sess.; cf. Hearing before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on S. 1, S. 1400, and S. 1401 (Imposition of Capital Punishment), 93d Cong., 1st Sess.

S. 1401, as reported, read in relevant part:

"§ 3562A. Sentencing for capital offenses

"(a) A person shall be subjected to the penalty of death for any offense prohibited by the laws of the United States only if a hearing is held in accordance with this section.

"(b) When a defendant is found guilty of or pleads guilty to an offense for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in subsections (f), (g), and (h) for the purpose of determining the sentence to be imposed. The hearing shall not be held if the government stipulates that none of the applicable aggravating factors set forth in subsections (g) and (h) exists or that one or more of the mitigating factors set forth

in subsection (f) exists. The hearing shall be conducted—

"(1) before the jury which determined the defendant's guilt;

"(2) before a jury impanelled for the purpose of the hearing if—

"(A) the defendant was convicted upon a plea of guilty;

"(B) the defendant was convicted after a trial before the court sitting without a jury;

"(C) the jury which determined the defendant's guilt has been discharged by the court for good cause; or

"(D) appeal of the original imposition of the death penalty has resulted in a remand for redetermination of sentence under this section; or

"(3) before the court alone, upon the motion of the defendant and with the approval of the court and of the government.

"(c) In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life or for the protection of the national security. Any presentence information withheld from the defendant shall not be considered in determining the existence of the factors set forth in subsections (g) and (h) or the nonexistence of factors set forth in subsection (f). Any information relevant to any of the

mitigating factors set forth in subsection (f) may be presented by either the government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating factors set forth in subsections (g) and (h) shall be governed by the rules governing the admission of evidence at criminal trials. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the factors set forth in subsections (f), (g), and (h). The burden of establishing the existence of any of the factors set forth in subsections (g) and (h) is on the government. The burden of establishing the existence of any of the factors set forth in subsection (f) is on the defendant.

"(d) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the factors set forth in subsection (f) and as to the existence or nonexistence of each of the applicable factors set forth in subsections (g) and (h).

"(e) If the jury or, if there is no jury, the court finds by a preponderance of the information that one or more of the applicable factors set forth in subsections (g) and (h) exists and that none of the factors set forth in subsection (f) exists, the court shall sentence the defendant to death. If the jury or, if there is no jury, the court finds that none of the applicable aggravat-

ing factors set forth in subsections (g) and (h) exists, or finds that one or more of the mitigating factors set forth in subsection (f) exists, the court shall not sentence the defendant to death but shall impose any other sentence provided for the offense for which the defendant was convicted.

"(f) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (d) that at the time of the offense—

"(1) he was under the age of eighteen;

"(2) his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution;

"(3) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution;

"(4) he was a principal, as defined in section 2(a) of this title, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

"(5) he could not reasonably have foreseen that his conduct in the course of the commission of murder, or other offense resulting in death for which he was convicted would cause, or would create a grave risk of causing, death to any person.

"(g) If the defendant is found guilty of or pleads guilty to an offense under section 794 or section 2381 of this title and if no mitigating factor set forth in subsection (f) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (d) that—

"(1) the defendant has been convicted of another offense under one of such sections, committed before the time of the offense, for which a sentence of life imprisonment or death was authorized by statute;

"(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; or

"(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person.

Provided, That if the charge is under section 794 (a) of this title, the sentence of death shall not be imposed unless the jury or, if there is no jury, the court further finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems or other means of defense or retaliation against large scale attack, war plans, communications intelligence or cryptographic information, or any other major weapons system or major element of defense strategy.

"(h) If the defendant is found guilty of or pleads guilty to murder or any other offense for which the death penalty is available because death

resulted and if no mitigating factor set forth in subsection (f) is present, the court shall impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict as provided in subsection (d) that—

"(1) the death or injury resulting in death occurred during the commission or attempted commission of or during the immediate flight from the commission or attempted commission of an offense under section 751 (Prisoners in custody of institution or officer), section 794 (Gathering or delivering defense information to aid foreign government), section 844(d) (Transportation of explosives in interstate commerce for certain purposes), section 844(f) (Destruction of government property by explosives), section 844(i) (Destruction of property in interstate commerce by explosives), section 1201 (Kidnaping, or section 2381 (Treason) of this title, or section 902(i) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472(ii) (Aircraft piracy);

"(2) the defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, committed either before or at the time of the offense, for which a sentence of life imprisonment or death was authorized by statute;

"(3) the defendant has previously been convicted of two or more State or Federal offenses with a penalty of more than one year imprisonment, committed on different occasions before the time of the offense, involving the infliction of serious bodily injury upon another person;

"(4) in the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense;

"(5) the defendant committed the offense in an especially heinous, cruel, or depraved manner.

"(6) the defendant procured the commission of the offense by payment, or promise of payment of anything of pecuniary value;

"(7) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value; or

"(8) the defendant committed the offense against—

"(A) the President of the United States, the President-elect, the Vice President, or if there is no Vice President, the officer next in order of succession to the office of the President of the United States, the Vice-President-elect, or any person who is acting as President under the Constitution and laws of the United States;

"(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

"(C) a foreign official listed in section 1116(b)(1) of this title, if he is in the United States because of his official duties; or

"(D) a Justice of the Supreme Court, a Federal law enforcement officer, or an employee of a United States penal or correctional institution, while performing his official duties or because of his status as a

public servant. For purposes of this subsection, a 'law enforcement officer' is a public servant authorized by law or by a government agency to conduct or engage in the prevention, investigation, or prosecution of an offense."

* * * *

"§ 3742. Appeal from sentence of death

"In any case in which the sentence of death is imposed after a proceeding under section 3562 A of chapter 227 of this title, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Such review shall have priority over all other cases. On review of the sentence, the court of appeals shall consider the record, including the entire presentence report, if any, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the findings under section 3562A(d). If the court of appeals finds that: (1) the procedures employed in the sentencing hearing were not contrary to law, or were contrary to law only in a manner constituting harmless error, and (2) the findings under section 3562A(d) were not clearly erroneous, or were clearly erroneous but the sentence was not affected, it shall affirm the sentence. If the court of appeals finds that the procedures employed in the sentencing hearing were contrary to law in a manner not constituting harmless error, it shall set aside the sentence and remand the case for redetermination of sentence in accordance with section 3562A. If the court of

appeals finds that a finding under section 3562A (d) was clearly erroneous and that the sentence was affected by such clearly erroneous finding, it shall set aside the sentence and remand the case for imposition of a sentence other than death. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

* * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 567385 97

Supreme Court, U. S.
FILED
FEB 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

vs.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

Brief of Amicus Curiae in Support of Respondent

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IN THE

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JESSE THURMAN FOWLER,

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vs.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

Brief of Amicus Curiae in Support of Respondent

Interest of Amicus Curiae

The State of California files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of California have a vital interest in the question presented on the grant of certiorari in this case, that is, whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendments to the Constitution of the United States. (Petition for Certiorari, p. 2.)

For the reasons set forth below the State of California will be affected by the ultimate disposition of the question presented for review before this Honorable Court in the above entitled matter.

The attention of amicus will be directed to the fundamental issue: Is capital punishment cruel and unusual within the meaning of the Eighth and Fourteenth Amendments to the United States Constitution?

When this issue was last before this Honorable Court, the State of California was one of the parties appearing. *Aikens v. California,* No. 68-5027, reported in 403 U.S. 952, 91 S.Ct. 2280. The order granting certiorari in *Aikens* was made on June 28, 1971, and the question was stated, "does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." On the same date, similar orders were made in *Furman v. Georgia,* 403 U.S. 952, 91 S.Ct. 2282; *Jackson v. Georgia,* 403 U.S. 952, 91 S.Ct. 2287; and *Branch v. Texas,* 403 U.S. 952, 91 S.Ct. 2287. In the *Aikens* case, in contrast to the other three cases, at the guilt and penalty phases in the California court, three brutal murders were proved and, in the brief for the petitioner Aikens, it was conceded "we make no claim that if the death penalty can constitutionally be inflicted for any such crime, it cannot be inflicted on this petitioner." Petitioner's Brief, *Aikens v. California,* p. 5.

Prior to the date set for argument before this Honorable Court, in the *Aikens* and related cases, the California Supreme Court set for argument the case of *People v. Anderson* (Crim. No. 13617), which was ultimately reported in 6 Cal.3d 628 [498 P.2d 880] (1972). In the *Anderson* case, the California Supreme Court, on February 18, 1972, held that capital punishment was unconstitutional under Article I, section 6 of the state constitution in that it came within the proscription of the cruel *or* unusual punishment clause thereof, finding that it was cruel and also unusual.[1]

Although the *Aikens* matter was argued on January 17, 1972, along with *Furman, Jackson* and *Branch, supra,* when the *Anderson* case was decided on February 18, 1972, the suggestion was made to this Honorable Court that the *Anderson* decision mooted the issue involved in *Aikens* and that as a consequence the petition should be dismissed. Accordingly, on June 7, 1972, this Honorable Court in *Aikens v. California,* 406 U.S. 813, 814, determined, on the Suggestion of Mootness and Motion for Remand, the decision of the state court having rested on an adequate state ground and the holding having been determined by the California court to be fully retroactive and applying to any prisoner in the State of California under sentence of death, that the petitioner Aikens no longer faced a realistic threat of execution and that the issue upon which certiorari was granted was now moot. Accordingly, the writ of certiorari was dismissed.

On June 29, 1972, this Honorable Court rendered the decision in *Furman v. Georgia* reported in 408 U.S. 238, holding that in *those* cases (*Furman, Jackson* and *Branch*) the imposition and carrying out of the death sentence was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Thereafter, through exercise by the People of the initiative, the Constitution of the State of California was amended, effective on November 7, 1972, providing as set forth in Article I, section 27, that the death penalty provided in the State statutes should not be

---

[1]*Cf., In re Anderson,* 69 Cal.2d 613, 629-32 [447 P.2d 880] (1972).

deemed to be infliction of cruel or unusual punishments within the meaning of Article I, section 6, or any other provision of the state constitution. The amendment to the state constitution is attached to this brief and marked Appendix A.

Following the amendment of the state constitution and the ruling of this Honorable Court in *Furman v. Georgia, supra,* the Legislature of the State of California, by Senate Bill 450, which subsequently became Chapter 719 of the Statutes of 1973, enacted statutory provisions to reinstate the death penalty in certain circumstances. Chapter 719 became effective January 1, 1974, and is attached to this brief and marked Appendix B.

It is evident that the People, by the exercise of the initiative, indicated what had previously been clear in the state constitution[2] that capital punishment was not to be prohibited as an available punishment for serious crimes and that abolition should be effected by the constitutional mode thereof by the vote of the representatives of the People through their Legislature and not locked into the constitution forever by judicial edict.

Amicus contends that the prohibition of the Eighth Amendment to the Federal Constitution against cruel and unusual punishment should not be construed as a bar to the states or to the Congress to provide as a punishment for serious crimes the death penalty and that the imposition of such punishment for such serious crimes is not prohibited by the Federal Constitution.

---

[2]Article I, sections 6, 8 and 13 as the article then read. Article VI, section 11 gives the State Supreme Court direct appellate jurisdiction in *capital* cases.

Amicus is concerned that petitioner herein seeks to importune this Honorable Court to "lock into" the United States Constitution the abolition of capital punishment and to place beyond the power of Congress and the People, through the legislatures of the several states, the right to determine that the protection of society from serious crimes requires the availability of this sanction, a dilemma which only recently confronted the People of the State of California.

The State of California has been authorized by the Attorney General of Oklahoma, the Honorable Larry Derryberry, to inform the Court that the State of Oklahoma joins in this amicus brief and in urging that the provisions of the United States Constitution do not prohibit capital punishment as a penal sanction for serious crimes.

The State of California is also authorized to state that the State of Texas, by the Honorable John L. Hill, Attorney General, supports amicus in its basic position that it is constitutionally permissible for state legislatures to provide for the death penalty for certain crimes.

Summary of Argument

Capital punishment has been recognized as a permissible punishment for serious crimes since the establishment of our nation. It was expressly referred to in the Fifth Amendment, adopted at the same time as the Eighth. The wisdom and social desirability of this penal sanction are matters addressed to the legislative branch of government.

This Court has not declared the death penalty to be unconstitutional *per se* and in decisions in which other forms of punishment were held cruel and unusual,

i.e., Weems v. United States, 217 U.S. 349; *Trop v. Dulles,* 356 U.S. 86, and *Robinson v. California,* 370 U.S. 660, it was assumed or expressly stated that the death penalty did not violate the Constitution. *Furman v. Georgia, supra,* did not reverse this line of authority.

The intent of the Framers was to bar only those punishments both cruel and unusual either in their inherent form or as grossly excessive in their application in relation to the seriousness of the particular crime.

The arguments of petitioner that capital punishment serves no social purpose and his claim that there are alternative penal sanctions should be directed to Congress and the legislatures of the several states and do not raise a constitutional question. No burden is placed on the People or the states to present conclusive proof of the utility of this form of punishment and any burden, if one exists, is only to demonstrate that there is in fact a basis upon which Congress and the state legislatures could reasonably conclude that certain serious offenses should be punished by death.

The studies upon which petitioner relies for his conclusion that capital punishment serves no penal purpose have obvious flaws and there are numerous graphic illustrations of the deterrent effect of this sanction as well as proof of the inadequacy of incapacitation by life imprisonment as a protection for society. The deterrent force of the threat of the death penalty has been recognized by this Court and those who come into direct contact with the criminal offender.

It must be concluded that petitioner has failed to make a case for his contention that no legitimate social aim can be furthered by the availability of this form of punishment.

Petitioner's claim that this form of punishment has been rejected by society is refuted by the evidence he presents. The claim is also refuted by the response at the ballot box and in the legislative halls of a majority of the states. The recent enactments by Congress and the majority of the states of legislation providing for capital punishment is indicative of the continuing recognition of the need for this penalty as a protection for society.

Amicus submits that nothing has happened in the 185-year history of the Constitution which requires this Court to now declare the punishment, expressly recognized in our Constitution and upheld by a line of decisions spanning a good part of our nation's existence, to be in violation of the Eighth Amendment.

It must be concluded that this accepted form of punishment is not "cruel and unusual" in violation of the Eighth Amendment.

ARGUMENT

Capital Punishment Is a Form of Punishment Expressly Recognized by Provisions of the United States Constitution and by a Line of Court Decisions Spanning Over 180 Years and Petitioner Has Presented No Constitutional Basis for His Claim That It Now Should Be Declared to Be Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments

A. Introduction

Amicus will direct the argument to the contention that the infliction of the punishment of death is excessive (Br. for Pet., pp. 102-40), and in violation of the prohibition of cruel and unusual punishments contained in the Eighth Amendment to the United States Constitution.

If the questions relating to the North Carolina procedure as to the charging function of the prosecutor (Br. for Pet., pp. 45-53), the disposition of cases before trial (Br. for Pet., pp. 53-61), the fact finding function of the jury under the guarantee of the Sixth Amendment (Br. for Pet., pp. 62-95), and the exercise of the clemency function of the executive (Br. for Pet., pp. 95-101) are before the Court on the grant of certiorari in this case, amicus will leave these matters to the respondent for reply.

It is submitted that *Furman* struck down the imposition and carrying out of discretionary death sentences and that it did not discuss other functions of the criminal justice system (referred to by petitioner as "these mechanisms" (Br. for Pet., p. 102)). The prosecutor is a public officer charged with duties and obligations as a member of a coordinate branch of government.

He can take into account special facts and circumstances of the particular case not taken into account by rigid rules. Traditionally this function has not been disturbed except where the exercise thereof has been based on a suspect or unjustifiable standard, such as race, religion, or other arbitrary classifications. *See Oyler v. Boles,* 368 U.S. 448; *Newman v. United States,* 382 F.2d 479, 480. This rule would also be applicable to pleas and other dispositions in the individual cases. *Furman* likewise was not directed at the fact finding function of juries and this was not the "discretion" of which the Court spoke; nor was the clemency power of the executive impugned.

Petitioner has not shown any reason why these vital functions in the system of justice, and to which *Furman* was not directed, should be treated differently when a death penalty is possible. It is submitted that in arguing such a departure from customary procedure in the federal and state systems of criminal justice petitioner reads too much into *Furman. See State v. Jarrette,* 284 N.C. 625, 202 S.E.2d 721, 741-43.

B. The Constitution and the Decisions of This Court Set the Standard of Review on the Issue of Constitutionality of the Death Penalty

Under the caption "The Standard of Judicial Review" petitioner (pp. 103-21) attempts to have this Honorable Court ignore the clear mandate in the Constitution, the amendments thereto and the decisions of this Court in numerous cases throughout our history and to hold that now, because of some magic talisman called "evolving standards", the death penalty is forbidden to Congress and the various states by the Eighth Amendment.

It is the contention of amicus that the United States Constitution does not forbid the Congress and the various states from providing such a sanction in performing the function of affording protection to the law abiding citizens.

It is, of course, a tempting invitation to enact one's personal predelictions into the constitution. It is acknowledged that this puts judicial restraint to a severe test.

The petitioner speaks as though the recognition of the retention of the power of the People to abolish or retain capital punishment relegates the power in the court under the Eighth Amendment to "mere advice." His complaint is that to acknowledge that the court lacks power to legislate the abolition of capital punishment makes the Eighth Amendment a nullity. This argument is made without regard for the proper exercise of that power by this Court in reversing convictions in *Weems, supra; Trop, supra;* and *Robinson v. California, supra*. In *Weems*, the reversal of the judgment was on the basis of cruelty inherent in the punishment. In *Trop* and *Robinson*, it was the disproportionate penalties involved that required the reversal.

See Granucci, "Nor Cruel and Unusual Punishment Inflicted the Original Meaning" 7 Calif. L.Rev. 839.

The Court has not considered itself foreclosed from considering whether in a particular case the Eighth and Fourteenth Amendments have been offended. However, the Court has not considered itself free to read into a portion of the constitution a meaning that is plainly at variance with its language.

Amicus contends that the Constitution does not permit "evolving standards" to be the basis for taking

away those rights retained by the states and the People and expressly permitted forms of punishment contemplated as constitutional, without complying with the provisions of that document for the orderly and lawful amendment thereof. U.S. Const. Art. V.

In response to the argument that the scope of judicial review must include the power to declare the abolition of capital punishment, amicus contends that the clear intent of the Framers of the Constitution and its amendments was to bar only those punishments which are both cruel and unusual either in their inherent form or grossly excessive in their application in relation to the seriousness of a particular criminal act.

It cannot be said that a constitutional issue is presented to this Court by petitioner's claim that alternative remedies are available to the states and Congress. Most of petitoner's arguments should properly be directed to Congress and to the various state legislatures. Petitioner has a burden, that he has not met, to demonstrate that the legislative bodies charged with the difficult task of fashioning punishment for serious crimes could not determine that capital punishment is a necessary weapon in the arsenal of society to combat serious and violent crime.

As Mr. Justice Harlan stated in *McGautha v. California*, 402 U.S. 183, 195-96, the court's "function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures . . . in such cases." The question for decision is not whether the Court approves the procedures followed, the question is whether those procedures fall below the minimum level the Constitution would tolerate.

The judgment as to the feasibility of capital punishment is one that the Constitution delegates to the Legislature. The Eighth Amendment has not in the past, nor does it now, forbid to the Congress or the legislatures of the several states the power to determine that capital punishment can serve a proper penal purpose in the structure and framework of the criminal justice system.

Chief Justice Burger, dissenting in *Furman, supra* at 384, set the proper standard for judicial review of this matter,

> "I do not suggest that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment, but, rather, that the primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not provable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in society. This presumption can only be negated by unambiguous and compelling evidence of legislative default."

Such evidence has not been forthcoming!

There is no issue before this Court of the wisdom or social desirability of capital punishment. These are questions addressed wholly to legislators. Even those who are personally opposed to capital punishment may well conclude that it violates no provision of the Constitution. The petitioner strives to wrest from the Constitution the power in the court to now declare that what was accepted as a mode of punishment for crime from the time of the inception of the nation is no longer to be tolerated by the Constitution. This is a task

of some magnitude in light of the authorities which will be reviewed.

C. Capital Punishment Is Recognized in the Constitution as a Form of Punishment Available to the People

The history of capital punishment in this country and the deep rooted origins of that form of punishment in the religious and moral heritage of contemporary America provide clear indications that the death penalty is no barbaric relic of the past.

Execution as a form of punishment is expressly recognized by provisions of the United States Constitution. The Constitution as originally written, contained indirect allusions to capital punishment. Among the Constitution's objectives as set forth in the preamble were to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Further evidence of the Framers' intentions is contained in Article II, section 2, giving the President power to grant reprieves (withdrawal of sentence of death) and Article III, section 3, providing that Congress shall have power to declare the punishment for treason, the common punishment then, and now in jurisdictions retaining capital punishment, being death. The specifications of these objectives suggest that the Framers intended the new federal government to have the inherent power of all governments to decree whatever customary punishments for criminal conduct were deemed necessary to protect the lives, liberties and properties of its citizens. *See In re Kemmler,* 136 U.S. 436 at 449. Absent particular prohibitions written into the Constitution, this was to be the rule. Similarly, three years later, the Tenth Amendment recognized that pow-

ers not prohibited to the states or delegated to the federal government were reserved to the respective states or to the People.

The history of the phrase "cruel and unusual punishment" and its inclusion in the first ten amendments to the United States Constitution has been treated at length in recent opinions of this Honorable Court and in some exhaustive commentaries by scholars. One fact stands out clear and was well stated by Mr. Justice Black, concurring in *McGautha v. California, supra,* 402 U.S. 183 at 226, the Eighth Amendment's "words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable . . . that the framers intended to end capital punishment by the Amendment."

The first ten Amendments to the Constitution were proposed by the First Congress and in turn ratified by the States in 1791. Among these, the Fifth Amendment expressly recognized what had been implied in the provisions of the original Constitution, that death was among the forms of punishment for criminal conduct available to the federal government. The Fifth Amendment contains a mandate that "No person shall be held to answer for a *capital,* or otherwise infamous crime, unless on a presentment or indictment of the grand jury." The amendment further commands that no person "be twice put in jeopardy of *life*", nor deprived of *life,* liberty, or property, without due process of law. This language was included and made applicable to the states in 1868 by the Fourteenth Amendment.

The following chronology further refutes the contention that those who enacted the Eighth Amendment

intended thereby to abolish capital punishment. The amendment passed the First Congress on September 25, 1789. That same Congress, a mere seven months later enacted "An Act for the Punishment of Certain Crimes Against the United States", which statute made the following offenses punishable by death by hanging: treason, murder within federal territory, piracy, and counterfeiting of public securities. *See* Act of April 30, 1790, ch. 9, §§ 1, 3, 8, 14, 33, 1 Stat. 112. The Eighth Amendment was ratified by the states on December 15, 1791, and less than four months later on April 2, 1792, the Second Congress made it a capital offense to debase coins of the United States Mint. Act of April 2, 1792, ch. 16, § 19, 1 Stat. 246.

As will be developed hereafter, the interpretation of the clause by this Court[3] confirms the conclusion that capital punishment was not prohibited to the federal government or the states by the Eighth Amendment.

D. This Court Has Recognized the Constitutionality of Capital Punishment for Over 180 Years

The subsequent history of the Eighth Amendment as it has been interpreted by this Court in 184 years of its existence likewise lends no support to the claim of petitioner that the death penalty is unconstitutional when carried out without unnecessary cruelty as punishment for a serious offense such as murder.

The first occasion this Honorable Court had to consider at any length the constitutional prohibition against cruel and unusual punishment was in 1878 in the

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[3]When *Furman* was before this Court, the constitutions of 48 states contained some provision against excessive punishment but, with the California experience excepted, no state court had interpreted these provisions as abolishing capital punishment.

case of *Wilkerson v. Utah,* 99 U.S. 130. In that case the Court upheld the mode of execution, shooting, as not forbidden by the Constitution's prohibition against cruel and unusual punishment. This Court noted the difficulty in defining "the extent of the constitutional provision" but the applicability of the provision to punishments of torture and all others involving unnecessary cruelty.

In 1890, the Court denied an application for writ of habeas corpus sought on an allegation that death by electrocution constituted a cruel and unusual punishment. *In re Kemmler,* 136 U.S. 436. This Honorable Court denied the application on the grounds that the Eighth Amendment did not apply to state legislation, but added the comment:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, *something more than the mere extinguishment of life.*" (Emphasis added.)

In *Weems v. United States, supra,* 217 U.S. 349, this Honorable Court in 1910, for the first time, overturned a punishment as cruel and unusual. In that case the defendant, on conviction of falsifying an official document, had been sentenced to 15 years of hard labor to be served in wrist and ankle chains with attendant life-long disabilities and a severe fine. The case arose under the Philippine Bill of Rights, whose prohibition against "infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning." (*Id.* at p. 367).

This Court was not troubled by the circumstance that the punishment was somewhat novel in the context of the type of punishment to which the cruel and unusual clause was thought to apply noting that the clause, like all principles "to be vital must be capable of wider application than the mischief which gave it birth." Quoting from Cooley's Constitution Limitations, the Court stated that it was probable that "any punishment declared by statute for an offense which was punishable the same way at common law could not be regarded as cruel or unusual, in a constitutional sense."

In setting aside the punishment, this Court in *Weems* noted that "there are degrees of homicide that are not punished so severely" and that the statute in question had no parallel in American legislation and came from a government of different origins. The Court found the statute "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind." (*Id.* at p. 377).

In 1947, the case of *Francis v. Resweber,* 329 U.S. 459, was considered by the Court. In this case the issue was whether a pending second electrocution of a condemned murderer following an unsuccessful first attempt at execution constituted cruel and unusual punishment. The Court rejected the claim of unconstitutional punishment. In an opinion joined by three other members of the Court, Mr. Justice Reed, in announcing the judgment of the Court, discussed the issue under the assumption, but not so deciding, that a violation of the Eighth Amendment would be violative of the

Fourteenth Amendment's due process clause. The opinion concluded:

> "We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.
>
> ". . . . The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, *not the necessary suffering involved in any method employed to extinguish life humanly.*" (*Id.* at pp. 463-64; emphasis added).

The next occasion on which this Court examined the scope of the Eighth Amendment's prohibition against cruel and unusual punishment was in 1958 in the case of *Trop v. Dulles, supra,* 356 U.S. 86, in which Chief Justice Warren, joined by three other members of the Court, concluded that denationalization of a native-born citizen for less than one day's desertion from military duty constituted unconstitutional punishment. Justice Brennan found the enactment of such punishment beyond the power of Congress to legislate. Four justices rejected both theories and would have upheld the statute upon which the denationalization was premised.

Chief Justice Warren's opinion noted that initially, "since wartime desertion is punishable by death, there

can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." While recognizing the phrase cruel and unusual punishment was not precise, the opinion clarified the scope of the constitutional prohibition against such punishment by stating, "Fines, imprisonment and *even execution* may be imposed depending upon the enormity of the crime but any technique outside the bounds of these traditional penalties is constitutionally suspect." (Emphasis added). Thus the penalty in *Weems* was characterized as meeting the two-prong test of being cruel in its excessiveness and unusual in its character, as was the penalty in the case then before the Court. Stating that the Eighth Amendment must "draw its meaning from its evolving standards of decency that mark the progress of a maturing society", Chief Justice Warren concluded that denationalization under the circumstances before the Court constituted "a form of punishment more primitive than torture." Significantly, Chief Justice Warren stated:

> "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be on capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concepts of cruelty." *Trop v. Dulles, supra* at 99.

Thus the opinion of the Court, while recognizing the forceful legislative arguments against the death penalty, rejected the constitutional argument against that form of punishment.

Any doubt whether the Eighth Amendment's ban on cruel and unusual punishment applied to the states through the operation of the Fourteenth Amendment was dispelled in 1962 by the decision of this Court in *Robinson v. California,* 370 U.S. 660, which invalidated punishment of imprisonment imposed on the defendant by reason of his being found addicted to narcotics. In this case the Court's opinion focused not on the nature of the punishment, which was only 90 days in county jail, but on its inappropriateness as applied to a status, that of being a narcotic addict.

In 1968, this Honorable Court refused to extend its ruling in *Robinson* to the punishment, by a fine of $50, of a defendant convicted of the crime of being intoxicated in a public place, *Powell v. Texas,* 392 U.S. 514. In this case the plurality opinion of the Court distinguished the punishment of status involved in *Robinson* from the punishment of the uncompelled act before the Court in *Powell.*

If the decisions of this Court applying the cruel and unusual punishment clause are susceptible of synthesization into a consistent body of principles, the cases appear to stand for the following propositions, punishment will be held unconstitutional if it is both cruel and unusual either as (1) a punishment inherently cruel and inherently unusual in its form or (2) a punishment not inherently cruel and unusual but grossly excessive as applied (a) in relation to the seriousness of the particular criminal act or (b) to any status which does not involve an uncompelled act.

Seizing upon some of the language of the plurality opinion in *Trop v. Dulles, supra,* 356 U.S. 86, as proof that that decision signaled the end of the right of both the Congress and the legislatures of the various states

to prescribe death as a punishment for first degree murder, the petitioner ignores the fact that the opinion in question went out of its way to recognize the Constitutional validity of the death penalty. The words that the petitioner uses are "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra* at 101. To be fair to petitioner, his fixation with this phrase is understandable in view of the fact that it provides the only arguable escape from the historical reality of capital punishment's recognition as a legitimate penalty, outside the scope of cruel and unusual punishments, in the wording of the Constitution and in the law that preceded and followed adoption of that document and the Bill of Rights.

In petitioner's attempt to avoid the impact of this history, he has failed to demonstrate that anything has transpired in the last 17 years since 1958 that has impugned the validity of the observation made by Chief Justice Warren that the death penalty "in a day when it is still widely accepted cannot be said to violate the constitutional concept of cruelty." *Trop v. Dulles, supra,* 356 U.S. 86 at 99.

Amicus contends that *Furman* did not overrule the cases discussed hereinabove or impugn their validity as proper interpretations of the Eighth Amendment to our Constitution. Further, that the short time since *Trop* was decided has not seen any retreat from the wide acceptance of capital punishment recognized as foreclosing any constitutional rejection of capital punishment.

Amicus adopts the analysis of the Chief Justice in his dissenting opinion in *Furman v. Georgia, supra,* at 375-76, 396-403, that the Court did not rule capital

punishment *per se* violative of the Eighth Amendment, but that the judgments in the cases before the Court were to be set aside because of discretionary sentencing practices; that the Eighth Amendment could not be construed to be a bar to the imposition of the sentence of death but that juries and judges were not to be permitted to make the sentencing determination in the same manner as they had in the past.

See also Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia" 25 Stan. L. Rev. 62; "You May Kill, But You Must Promise Not to Use Discretion: Furman v. Georgia" 6 Loyola L. Rev. 526 (1973).

E. Congress and the Legislatures of the Various States Can Reasonably Determine That the Protection of Society Under Present Conditions Requires Death as a Form of Punishment for Certain Serious Offenses

The amicus contends that the death penalty does serve a vital purpose in the punishment structure of society and that this is a matter upon which the legislatures of the various states and the Congress may make a determination.

Amicus does not concede that it has the burden of proving that the death penalty is a superior deterrent by making this argument, nor that capital punishment must be established as a more effective punishment for crime in order that this penalty be constitutionally acceptable. It was not the intention of the Framers of the Constitution to require such a showing by Congress or the states.

The showing as to the social utility of capital punishment should be addressed to the legislative body and the burden, if any, which must be assumed in the judi-

cial setting, is only to demonstrate that there is, in fact, a basis upon which the legislatures of the various states and Congress could reasonably conclude that certain serious offenses should be punished by death.

It is a settled doctrine of constitutional law that the burden of proof is on the one who challenges the constitutionality of a statute and that in the absence of a clear showing of unconstitutionality a state statute will be presumed valid. *McGowan v. Maryland,* 366 U.S. 420, 425-26.

Many of the arguments made by the petitioner are moral, humanitarian, and pragmatic arguments against capital punishment which might well prove persuasive to the Legislature in considering a change in the law or to a governor asked to commute a sentence of a condemned person, but, in this Court, the argument must stand or fall on its own since this Court is limited to the issue of constitutionality and it cannot write into the law its notion of morality or humanitarianism or its pragmatic preferences.

As a purely constitutional matter, the analysis made by petitioner gives too little weight to the elements of retribution and deterrence and gives too much weight to "advance concepts of behavioral science." It is submitted that the constitution does not require legislatures to reflect sociological insight or shifting social standards any more than it requires them to keep abreast of the latest scientific standards.

See Goesaert v. Cleary, 335 U.S. 464, 466; *see also, McGautha v. California, supra,* 402 U.S. 183, 221.

The basic elements commonly ascribed as the purposes of punishment may be reduced to four: (1) deterrence; (2) incapacitation or isolation; (3) rehabilitation; and (4) retribution. As to rehabilitation, it is ob-

vious that as to the serious criminal offender deemed not to be capable of rehabilitation and sentenced to death, this purpose of punishment is not effective. As to retribution, while it may not now be recognized as a major objective in our system of punishment, as Lord Justice Denning said,

> "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objectives of punishment as being deterrent or reformative or preventive and nothing else. . . . The ultimate justification of any punishment is . . . that it is the emphatic denunciation by the community of a crime; and . . . there are some murders which . . . demand the most emphatic denunciation of all, namely the death penalty." Quoted in National Commission on Reform of Federal Criminal Laws, 2 Working Papers 1359 (n. 47) (1970).

And as Mr. Justice Stewart said in his concurring opinion in *Furman v. Georgia, supra,* at 308,

> "On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice and lynch law."

One commentator (Morris R. Cohen, "Moral Aspects of Criminal Law" 49 Yale L. J. 987 at 1011-12), in discussing the retributive theory of punishment said that those who ignore this facet of punishment are only evidencing sentimental foolishness, that if the natural desire for vengeance is not met and satisfied by the orderly procedure of the criminal law there is danger of reversion to the bloody vengeance of the feud and vendetta.

See also: Packer, Comment, "Making the Punishment Fit the Crime" 77 Harv. L. Rev. 1071, 1078.

What, then, of deterrence? Has the petitioner conclusively established that the death penalty deters no significantly greater number of persons from committing murder than does the prospect of life imprisonment?

The studies upon which petitioner relies conclude that the death penalty exerts no discernible influence on the rate of homicides. The truism that one may prove almost anything with statistics is a circumstance that makes one particularly concerned, in a matter as fraught with strong feelings as the desirability of the death penalty, that the statistician be totally objective and free of bias.

It may be accepted that the statistical studies do not prove or disprove the deterrent effect of capital punishment. However, it is also true that these statistical findings do not focus on the various differential factors that are operative in the various jurisdictions which they attempt to pronounce. Social and economic conditions such as population pressure, unemployment rate, influx of racial and ethnic minorities, in addition to such factors as the efficacy of local law enforcement, climate and weather, and the number of attractive

crime targets, all play a significant role in determining the number of homicides, particularly robbery homicides, committed in a certain jurisdiction in a given period of time. The existence of so many influential factors not susceptible of measurement and correlation would impugn the statistical methodology on which petitioner places so much reliance. Clearly the existence of these variables precludes a meaningful comparison between general undifferentiated murder statistics and a single proposed casual factor—that of the existence of the death penalty in a particular jurisdiction.

Secondly, the steady increase of homicides across the nation, presumably caused by social and economic factors, naturally tends to cover up the perceptible deterrent effects of the death penalty which might appear in the antiseptic conditions of the social laboratory.

A third objection to the statistical approach is that it measures the homicide rate in terms of the theoretical existence of the death penalty, that is, the existing statutes and judgments imposing the punishment of death, rather than in terms of the actual existence of the death penalty, that is, executions carried out. During the previous decade in which the dramatic increases in murders were recorded, while juries continued at a relatively stable rate to fix the penalty of death in the appropriate cases, the annual number of executions in the United States dwindled to nothing. In this context, amicus concurs with petitioner's apparent view that the death penalty would be an even greater deterrent were it not for the inordinate delay existing in the courts today which precludes the application of swift punishment to the offender. Interestingly enough, the homicide rate in California was relatively stable in the decade from 1953 to 1963. In 1963, the year of the last execution, except for the one in April of 1967, the rate was 3.8 per hundred thousand population. The rate climbed to 6.0 in 1968 and 6.9 in 1969. The current statistics are even higher (8.7 in 1972) and it is to be noted that nationwide, the murder increase has been marked since the judicially created moratorium on the death penalty in 1967. The period from 1968 through 1973 showed that the number of offenses of murder increased 42% and that the rate per hundred thousand inhabitants was up 35%.

Federal Bureau of Investigation, Uniform Crime Reports, 1973 (September 6, 1974) at pages 6-7.

As Justice Marshall observed in *Powell v. Texas, supra,* 392 U.S. 514 at 531, with general reference to the deterrent effect of criminal sanctions,

> ". . . . The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts."

Amicus submits that the foregoing statement has equal validity when applied specifically to the deterrent effect of the death penalty. It would appear to be a fact that to the rational person the threat of the greater punishment has a greater deterrent effect.

On deterrence, Professor Ball in his article, "The Deterrence Concept in Law and Criminology" notes that the statistical data pertaining to the effectiveness of capital punishment as a deterrent measure is generally

inconclusive. He notes that Jerome Hall has criticized the scientific pretentions of modern, positivistic criminology and has said that the so-called new penology is based upon implicit and unsupported dogmas (Jerome Hall, Criminology).

Deterrence is not the only function of punishment served better in many instances by the existence of the death penalty than by a maximum available punishment of life imprisonment. Despite petitioner's insistence to the contrary, life imprisonment often provides a woefully inadequate method of protecting society through incapacitation or isolation of the offender. In California, life imprisonment means the prisoner is eligible for parole after serving seven years of his term. Cal. Pen. Code § 3046. The myth that paroled murderers do not kill again evaporates upon a perusal of the case reports. In California this is evidenced by, among other cases, *People v. Peete,* 28 Cal.2d 306, 308-09 [169 P.2d 924, 926]; *People v. Purvis,* 52 Cal. 2d 871, 875 [346 P.2d 22, 24]; *People v. Gilbert,* 63 Cal.2d 690, 702 [408 P.2d 365, 372].

It is also to be noted that before this Court on a petition for certiorari is another case from North Carolina, *State v. Jarrette,* October term, 1973, No. 73-6877. In this case a convicted murderer escaped and in the process of escaping, raped a black girl and stabbed to death a white youth. *See State v. Jarrette, supra,* 202 S.E.2d 721. Certainly these are a few of what are many, many examples of the inadequacy of life imprisonment to protect society from such aggressive behavior. Congress and the legislative bodies of the various states are in the best position to determine the effectiveness of a form of punishment and to conclude

that for certain crimes the death penalty is the most effective method of protecting society.

It must be noted that the armed robber or armed burglar commonly faced with a maximum term of life imprisonment if apprehended might well consider himself foolish not to kill his victims or other witnesses if by doing so he would risk only the same penalty—life imprisonment for murder—while increasing multifold his chances of avoiding apprehension. The armed robber of a one-man liquor store operation would not let petitioner's views of the dignity of human life cause him to hesitate for a moment at killing a lonely figure behind the counter at a late hour when no other persons are around to witness such an execution. The same applies to the willingness of the armed robber to kill a police officer in order to avoid apprehension and conviction, when without the death penalty the criminal will risk no added punishment if he does away with his intended captor. This is also true of the "lifer" in a correctional facility who is faced with another life sentence for taking the life of a guard or inmate in prison. Such a sentence would not only be futile but would make a mockery of our system of justice.

We must note the judicial recognition of the deterrent effect of capital punishment which is contained in the reports of this Honorable Court. This Court noted the deterrent effect of capital punishment in *United States v. Jackson,* 390 U.S. 570 at 581, when it was said that the inevitable result of a statute providing for waiver of a jury trial to avoid possibility of a death penalty discouraged the assertion of the Fifth Amendment right to plead not guilty and that it acted to deter the exercise of the Sixth Amendment right to demand a jury trial, that such a provision "chills" the assertion

of these rights by penalizing those who choose to exercise them. It has been recognized that the death penalty is the most severe and awesome penalty known to our law and that the threat of the death penalty has been identified as a factor to be given considerable weight in determining whether a defendant has deliberately waived constitutional rights. *See Parker v. North Carolina,* 397 U.S. 790 at 809-10 (Brennan, J., dissenting).

In *Fay v. Noia,* 372 U.S. 391, 397, 439-40, Noia's attorney testified at the habeas corpus hearing that defendant Noia was motivated not to appeal his case by fear that if successful he might get the death penalty on a retrial. Had he appealed, he would have run a substantial risk of electrocution and, as this Court said, "his was a grisley choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which if successful might well have led to a retrial and the death sentence."

In another case, *North Carolina v. Alford,* 400 U.S. 25 at 40, in the dissenting opinion by Mr. Justice Brennan it was said that "it is sufficient to state that Alford *was 'so gripped by fear of the death penalty'* that his decision to plead guilty was not voluntary but was the product of duress as much so as the choice reflecting physical constraint." (Emphasis added).

It is submitted that state legislatures, as well as the Congress, can also conclude that the existence of the death penalty for certain heinous crimes might cause some potential murderers to be "so gripped by fear" that they would be deterred from criminal endeavors and would refrain from the firing of a gun at the lonely clerk standing in a liquor store or the police officer

attempting to effect an arrest. As the Joint Report of the Legislative Committee on Capital Punishment of Pennsylvania said, "The plain fact is that it can never be known how many persons are actually deterred by threat of punishment whether capital or otherwise." It is also said that if capital punishment is so unique, so abhorrent and so fearsome it seems inconceivable that a rational person trying to decide whether to commit a capital crime would ignore the potential penalty of death.

See Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia" 25 Stan. L. Rev. 62 at 76.

It must be recognized that the innocent life saved when the potential murderer is "so gripped by fear" of the death penalty as to hold his fire and refrain from taking someone's life is not reflected in the statistics surveyed by the social scientists.

Petitioner, an undeterred murderer, assures us that the death penalty does not deter. The fact that it does not deter *all* is no reason for rejecting this form of punishment (particularly by constitutional mandate). The statistics to which he refers lump the undeterrable murders with those that could possibly be deterred. Studies of murder rates and their relationship to the death penalty would be valid only if they were limited to deterrable homicides involving a course of criminal conduct understandingly embarked upon, such as armed robbery, collection of insurance on the victim's life, kidnapping for ransom, etc.

At this point it may be well to refer to some information collected by those who have first-hand information concerning the deterrent effect of capital punishment, namely, those who deal with homicidal offenders.

Sheriff Peter Pitchess of Los Angeles County, testified before the California Senate Committee on the Judiciary (1960) as follows:

> "But I can tell you that the overwhelming majority of people in law enforcement—the ones who are dealing with these criminals, the ones who are seeing them not as statistics but real live human beings, and who are studying their human behavior—are overwhelmingly convinced that capital punishment is a deterrent."

Likewise the late J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated his unqualified opposition to the abolition of capital punishment in an issue of the Uniform Crime Reports for the United States (1959 issue):

> "The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty. . . . For the law enforcement officer the time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessity ingredient."[4]

There have been many surveys conducted to test the deterrent effect of the threat of the death penalty. One is the study by the Los Angeles Police Department on Capital Punishment concluded in February, 1971. This survey confirmed the validity of the conclusion

[4]It may be noted that the Los Angeles Times (Nov. 16, 1966, Part I, p. 21) reported that "The Prison Officers Assn. of Great Britain has demanded the return of the death penalty, stating that since abolition of capital punishment . . . 'There is nothing to deter the growing number of long-term criminals from killing prison officers in an attempt to escape.'"

drawn by innumerable legislatures that the threat of the death penalty is a deterrent to murder and the incidents documented in the surveys are from contacts with criminals which are real and direct rather than merely academic. We, of course, do not imply that all those whose experience with the criminal world is purely academic conclude otherwise. One example is Van Den Haag, "On Deterrence and the Death Penalty" 60 J. Crim. L. C. and P. S. 141 (June, 1969).

The Los Angeles Police Department survey, embodied in a 62-page report, was conducted between December 21, 1970, and February 4, 1971, and involved the interviewing of 316 arrestees. Unarmed suspects were asked why they did not arm themselves, and armed suspects who did not use their weapons were asked why they did not. Of the 316 persons interviewed, 217 denied their crime or refused a statement, primarily out of a desire not to jeopardize their case. The positive statements made by the remaining 99 are classified as follows:

1.	Deterred by fear of death penalty from carrying weapon or operative weapon	50 (50.5%)
2.	Unaffected by death penalty because it was no longer being enforced	7 (7.07%)
3.	Undeterred by death penalty, would kill whether it was was enforced or not	10 (10.1%)
4.	Unaffected by death penalty because they would not carry weapon in any event, primarily out of fear of being injured themselves or of injuring someone else	32 (32.3%)

The conclusions drawn from the study are as follows:

> "I. The adoption of an effectively enforced death penalty system is a deterrent in the prevention of homicides.
>
> "II. Though the death penalty has not been removed from the statutes in California, many suspects believe in reality that no death penalty exists as it is not being enforced.
>
> "III. Some suspects, while realizing that the California death penalty exists in name only, disclose that the certainty of an executed death penalty would deter them from being armed while committing crimes."

The report also notes, "If this study contained only one and not the 50 documented cases supporting the fact that the death penalty is a deterrent, there should be no question of its retention and enforcement. In 1970 in the City of Los Angeles, 394 innocent people were victims of an unlawful execution without the right of due process of law."

On the basis of objective criteria, the report compiled and selected 25 case histories from the 99 individuals who made positive statements. Of the 25 arrestees, 16 were under arrest for robbery, 4 for burglary, 3 for felonious assault, and 2 for rape; and 10 were armed when arrested while 15 were not. The 25 statements are set forth in Appendix C.

An earlier survey by the Los Angeles Police Department is reported in *People v. Love*, 56 Cal.2d 720, 735-37 [336 P.2d 33, 41-42] (McComb, J. dissenting). The examples presented are contained in Appendix D.

It would appear that what this court has previously noted is ably supported by the foregoing, that is, that certain potential murderers are "so gripped by fear of the death penalty" that they refrain from taking life endangering action when in pursuit of their criminal enterprises, or, better yet, they do not engage in such enterprises at all.

Petitioner refers to these surveys and the statements of the law enforcement officers as "impressionistic accounts" (Br. for Pet., p. 128 n. 207) or as "anecedotal impressions" of law enforcement officers (Br. for Pet., Appendix E, p. 1e). It is clear that Congress and the legislatures of the various states have not treated so cavalierly these surveys and the testimony of those who come into daily contact with the criminal.

Likewise, in petitioner's Appendix E, petitioner has listed some of his conclusions regarding the utility of capital punishment, with particular reference to its deterrent effect. Amicus contends that the Constitution does not permit social scientists (Br. for Pet., Appendix E, pp. 3e-6e), law enforcement officers (pp. 7e-9e), or the undeterred prison inmate (pp. 9e-10e) who has committed murder to fashion the contours of the Eighth Amendment.

It is submitted that petitioner has failed to show that the death penalty serves no legitimate function in our society. As a consequence, the United States Constitution leaves the Congress and the legislatures of the various states, the elected representatives of the People, free to determine that the protection of society under present conditions requires death as a form of punishment for certain serious crimes.

F. Contemporary Society Recognizes Capital Punishment as a Permissible Form of Punishment in Its Arsenal to Combat Crime

Petitioner asserts that society has rejected capital punishment and that this "rejection" must be finalized by means of an Eighth Amendment interpretation by this Court.

However, petitioner is quick to admit that, "thirty jurisdictions have enacted death penalty legislation since *Furman*" (Br. for Pet., p. 131), adding that the legislation is narrower in all but two cases, than their pre-*Furman* authorizations of capital punishment. The response of the majority of states to accomplish the restoration of capital punishment is documented in Petitioner's Brief, Appendix A.

It is difficult to accept petitioner's argument on rejection when the elected representatives of the People in a majority of the states have so quickly responded to assure their constituents the protection of this sanction.

Petitioner also seems to argue that society has rejected capital punishment because, he asserts, prosecutors are not bound by rigid charging and plea acceptance rules, juries are not restricted in their findings on the facts, and governors and presidents are permitted to grant clemency; further, it appears that he contends that this punishment is only meted out to "racial minorities and to the poor."

Petitioner offers no proof of the validity of his legal assertions or of his factual claims and he is hard pressed in his attempt to make his "rejection by society" arguments appear realistic. Yet he asks this Court to accept his speculative arguments and to make a constitutional judgment based thereon!

Petitioner implies that it is only vengeful and misguided people, out of step with the "evolving standards of decency that mark the progress of a maturing society", who are in favor of the death penalty today. It is submitted that there are innumerable indicia of the public's continued general acceptance of the death penalty as a necessary form of punishment consistent with contemporary religious and moral standards of decency and the dignity of man.

While amicus wishes to emphasize that the meaning of the cruel and unusual punishment clause cannot expand and contract with the ebb and flow of something as fickle as public opinion as reflected in polls and surveys, nevertheless, since those who seek the abolition have relied on such indicators in support of their various contentions that the death penalty is out of favor with all but the police, prosecutors, and a few misguided others, amicus feels compelled to put this contention in the proper perspective.

Public sentiment has swung strongly in favor of the death penalty since this Court, citing a 1966 Gallop poll, characterized the United States as a nation less than half of whose people believed in the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 520. It is submitted that the recent polls demonstrate that public opinion has swung in favor of capital punishment. This has been illustrated not only in the Gallop polls that have been taken but also in the elections relating to retention or abolition of the death penalty.

Of course, the most recent large scale expression of public opinion, as far as California is concerned, occurred in 1972 when the death penalty initiative passed by an overwhelming majority, over 67% of the

voters voting in favor of the initiative (5,386,904 votes to restore the death penalty) and to enable the state to be restored to the constitutional balance in which the legislative branch was to make the determination as to whether capital punishment should be retained or abolished.

A similar referendum was held on December 15, 1970, when the voters of the State of Illinois, in conjunction with a vote on whether to ratify the new constitution adopted by their constitutional convention, were asked to ballot as to whether the death penalty should be abolished in that jurisdiction. The referendum results were comparable to the results later obtained in California, and serve as a good indication of the national sentiment, in view of the fact that Illinois is another large state having a substantial metropolitan and rural population. The referendum resulted in 64.3% vote against the abolition of capital punishment.

In addition, Congress has acted recently on this question. On July 17, and July 23, 1974, the House and Senate, respectively, adopted the conference report on the bill relating to aircraft hijacking which contained a death penalty provision. Cong. Quarterly, Weekly Report, No. 30, page 1983. The death penalty is now mandatory for airline hijackers who commit murder or cause a death indirectly (Public Law 93-366; U.S. News and World Report, page 30, January 20, 1975).

The popular sentiment in favor of the death penalty as a necessary form of punishment is reflected in the number of American jurisdictions that retained this penalty at the time that this Court spoke in *Furman*

v. Georgia, supra. At that time, the District of Columbia, the federal government, and forty of the fifty states retained capital punishment as a form of punishment for certain crimes. At the time *Furman* was decided, despite almost five years of the "moratorium", there were over 600 prisoners committed to prisons on judgments of death.

It is submitted that another accurate barometer of the "evolving standards" was the constant number of defendants whom juries annually sent to the nation's prison systems under sentence of death. U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1968). It would appear that juries are continuing to perform their function in maintaining a link between contemporary community values and the penal system. *Witherspoon v. Illinois, supra,* at 519 n.15.

The large majority of persons convinced of the need for capital punishment in America reflects a cross section of the nation's population. It is submitted that these persons, including retail clerks, grocery and liquor store operators, pharmacists, bank tellers, gas station attendants and others who, like police officers, have frequent occasion to look down the "business end" of a robber's pistol or shotgun, do not share this petitioner's sentiment that the death penalty is a barbaric relic of the past. In short, contrary to the impression that petitioner seeks to convey, there appears to be substantial support for the death penalty in almost all social, economic and occupational groups, and indeed, the preponderance of public opinion is in favor of retaining the death penalty as one of the forms of punishment available for serious offenses.

Petitioner apparently believes that this Court should respond to what he terms the "world-wide" trend toward ending the use of the death penalty. It is submitted that this is a frail foundation upon which to postulate the unconstitutionality of the death penalty in this country. It is ridiculous to say that the Framers of the Eighth Amendment had in mind in 1789 that what nations did throughout the world should impair the ability of the various states to provide adequate punishment for those who violate the laws of the state. Certainly the availability of the death penalty for the protection of society was not to be judged by what occurred in countries such as Lichtenstein, Luxembourg, Surinam or Mozambique.

It has been stated that the total number of nations which are abolitionist represent a minority in the world community and it is to be noted that the conditions that lead any one of the foreign jurisdictions to conclude that a particular punishment is or is not required for the protection of its population varies from nation to nation as conditions vary from state to state within our own federal republic. It is further to be noted that petitioner has not pointed to any abolitionist nation which has rejected the death penalty by judicial declaration or edict.

Patrick, "The Status of Capital Punishment: A World Perspective" (December 1965), 56 Jour. Crim. L. COPS 397, 411; Royal Commission on Capital Punishment, 1949-1953 Report 340.

Amicus understands that in England, which retains capital punishment for certain crimes as do many "abolition" nations, the House of Commons recently rejected a bill to restore capital punishment for certain

violent crimes (See Br. for Pet., p. 115 n.174). Amicus finds it reassuring that a nation, sharing a common heritage with the United States, still permits decisions as to the utility and availability of capital punishment to be determined by the elected representatives of the People!

Amicus submits that petitioner cannot sustain his claim that contemporary society rejects capital punishment. It is further evident that even if he could sustain this claim, he would state no case for the invalidation of the death penalty on a new interpretation of the Eighth Amendment by this Honorable Court.

Conclusion

In an era characterized by rising crime rates, mass killings, inmate homicides, revolutionary bombings of public buildings, and the assassination of public figures and law enforcement officers, it would be inappropriate for a legislature to contravene the intent of the Framers and the will of the People by abolishing capital punishment. How much less appropriate would it be for this Court, under the aegis of the Eighth Amendment, to decree that this form of punishment, expressly sanctioned by the words of the Constitution and a long line of decisions by this Court, is now forbidden to the People.

It is submitted that nothing has happened in the 185-year history of the Constitution which can alter the fact that the Framers contemplated the death penalty as a form of punishment of necessity available to the People and the states for the protection of society. Likewise, there has been no decision of this Court contravening the intent of the Framers and contem-

porary society has accepted this sanction as a proper weapon to combat crime.

Amicus respectfully submits that no case has been made by petitioner for this Court to take the unprecedented step of invalidating Congressional acts and state statutes providing for the death penalty on the ground that this punishment is now "cruel and unusual."

Respectfully submitted,

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APPENDIX A

[Death Penalty]

SEC. 27. All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution. [New section adopted November 7, 1972. Initiative measure.]

APPENDIX B

CHAPTER 719

An Act to Amend Section 1018 of, to add Sections 190, 190.1, 190.2, 190.3, 209, 219, and 4500 to, and to Repeal Sections 190, 190.1, 209, 219, and 4500 of, the Penal Code, Relating to Punishment for Crimes.

[Approved by Governor September 24, 1973.
Filed with Secretary of State September 24, 1973.]

The people of the State of California do enact as follows:

SECTION 1. Section 190 of the Penal Code is repealed.

SEC. 2. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death if any one or more of the special circumstances enumerated in Section 190.2 have been charged and found to be true in the manner provided in Section 190.1. Every person otherwise guilty of murder in the first degree shall suffer confinement in the state prison for life. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

SEC. 3. Section 190.1 of the Penal Code is repealed.

SEC. 4. Section 190.1 is added to the Penal Code, to read:

190.1. In any case in which the death penalty is to be imposed as the penalty for an offense only upon

the finding of the truth of the special circumstances enumerated in Section 190.2, the guilt or innocence of the person charged shall first be determined without a finding as to penalty. In any such case the person charged shall be represented by counsel. If such a person has been found guilty of such an offense, and has been found sane on any plea of not guilty by reason of insanity, and any one or more of the special circumstances enumerated in Section 190.2 have been charged, there shall be further proceedings on the issue of the special circumstances charged. In any such proceedings the person shall be represented by counsel. The determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented. In case of a reasonable doubt whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of a crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of the defendant's counsel, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of his counsel. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury, in which case a new jury shall be drawn to determine the issue

of whether or not any of the special circumstances charged are true or not true.

If the trier of fact finds, as to any person convicted of any offense under Section 190 requiring further proceedings that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, the defendant shall suffer the penalty of death, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prohibit the imposition of such penalty.

In any case in which the defendant has been found guilty by a jury, and the same or another jury is unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all of such special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be retried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach a unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose the punishment of confinement in the state prison for life.

SEC. 5. Section 190.2 is added to the Penal Code, to read:

190.2. The penalty of a person found guilty of first-degree murder shall be death in any case in which the

trier of fact pursuant to the further proceedings provided for in Section 190.1 makes a special finding that:

(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. "An agreement," as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim.

(b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:

(1) The victim is a peace officer, as defined in Section 830.1, subdivision (1) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceedings.

(3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery, in violation of Section 211.

(ii) Kidnapping, in violation of Section 207 or Section 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute kidnapping within the meaning of this paragraph.

(iii) Rape by force or violence, in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm, in violation of subdivision (3) of Section 261.

(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14, in violation of Section 288.

(v) Burglary, in violation of subdivision (1) of Section 460, of an inhabited dwelling housing entered by the defendant with an intent to commit grand or petit larceny or rape.

(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.

SEC. 6. Section 190.3 is added to the Penal Code, to read:

190.3 (a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of facts finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37 or 128, the death penalty shall not be imposed upon any person who is a principal in the commission of a capital offense unless he was personally present during the commis-

sion of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts.

SEC. 7. Section 209 of the Penal Code is repealed.

SEC. 8. Section 209 is added to the Penal Code, to read:

209. Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death in cases in which any person subjected to any such act suffers death, or shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers bodily harm, or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where no such person suffers death or bodily harm.

Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under Section 209 as it read prior to September 22, 1951, shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole.

SEC. 9. Section 219 of the Penal Code is repealed.

SEC. 10. Section 219 is added to the Penal Code, to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with death in cases in which any person subjected to any such act suffers death as a proximate result thereof, or imprisonment in the state prison for life without the possibility of parole in cases where any person suffers bodily harm as a proximate result thereof, or imprisonment in the state prison for life, with the possibility of parole, in cases where no person suffers death or bodily harm as a proximate result thereof.

SEC. 11. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be put in by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty to a capital offense which does not require the further proceedings pro-

vided for in Section 190.1 shall be received from a defendant. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall find that the defendant understands his rights to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 12. Section 4500 of the Penal Code is repealed.

SEC. 13. Section 4500 is added to the Penal Code, to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another, other than another inmate, with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, or the person so assaulted is another inmate, the punishment

shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 14. Notwithstanding Section 2164.3 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act because the duties, obligations or responsibilities imposed on local government by this act are minor in nature and will not cause any financial burden to local government.

SEC. 15. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provision or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

APPENDIX C

Statements of Arrestees Compiled by the Los Angeles Police Department's Study of the Deterrent Effect of the Death Penalty, February 1971

1. (unarmed robber) "Since in reality there is no death penalty in California, I would kill to obtain what I want."

2. (armed robber) "I used a pellet gun because I didn't want to kill anyone and be put to death in the gas chamber."

3. (unarmed burglar) "I don't carry a gun. I don't want to be shot at by police and am afraid of the death penalty."

4. (armed robber) "I used an unloaded gun in the robbery of a market so I would not hurt anyone and because I am afraid of the death penalty."

5. (armed robber) "The gun was unloaded because I didn't want to hurt anyone. I know the punishment would be greater if I shot anyone during a robbery."

6. (armed robber) "I would be afraid to use a gun because of possible death penalty."

7. (armed attempted murderer) "I would have shot it out if necessary, the death penalty is no deterrent."

8. (armed robber) "I used a blank revolver because I'm an ex-con."

9. (unarmed robber) "I would not use a gun, I am afraid of the consequences of the death penalty."

10. (unarmed burglar) "I never owned a gun because I'm afraid of the death penalty."

11. (unarmed burglar) "If I was armed I would not have used the weapon, I am afraid of the gas chamber."

12. (unarmed robber) "I didn't use a gun because I was afraid of being shot."

13. (armed suspect charged with assault with a deadly weapon) "I would kill if I had the chance, I'm not afraid of any courts. They are easy."

14. (unarmed attempted robber) "I am waiting for the death penalty to be removed, then everything is free."

15. (unarmed forceable rapist) "I don't carry a gun because I'm afraid of getting the death penalty."

16. (unarmed burglar) "Because of the death penalty, I would never arm myself."

17. (unarmed forceable rapist) "I have gotten into too much trouble before when I had a gun."

18. (armed suspect charged with assault with intent to commit murder) "Even if a death occurred as a result of a shooting, I am not afraid because no one believes in the death penalty anymore."

19. (unarmed robber) "I am afraid of the death penalty. I wasn't armed."

20. (unarmed robber) "I used a toy gun, I didn't want to hurt anyone."

21. (unarmed robber) "I don't carry a gun, I might shoot someone accidentally, I'm afraid of the death penalty."

22. (unarmed burglar) "I'm an ex-con, I would be an idiot to carry a gun. Punishment would be too great."

23. (armed robber) "I didn't want to hurt anyone, I had an empty gun."

24. (unarmed robber) "I would use weapon if I got into a bind. It doesn't make any difference, no one goes to the gas chamber."

25. (armed robber) "I would use gun if necessary, but I fear the death penalty."

APPENDIX D

Examples of Deterrent Effect of Threat of Death Penalty Taken From Records of the Los Angeles Police Department and Reported in People v. Love, 56 Cal. 2d 720, 735-37 [366 P.2d 33, 41-42] (McComb, J., dissenting).

(i) Margaret Elizabeth Daly, of San Pedro, was arrested August 28, 1961, for assaulting Pete Gibbons with a knife. She stated to investigating officers: "Yeh, I cut him and I should have done a better job. *I would have killed him but I didn't want to go to the gas chamber.*"

(ii) Robert D. Thomas, alias Robert Hall, an ex-convict from Kentucky; Melvin Eugene Young, alias Gene Wilson, a petty criminal from Iowa and Illinois; and Shirley R. Coffee, alias Elizabeth Salquist, of California, were arrested April 25, 1961, for robbery. They had used toy pistols to force their victims into rear rooms, where the victims were bound. When questioned by the investigating officers as to the reason for using toy guns instead of genuine guns, all three agreed that real guns were too dangerous, *as if someone were killed in the commission of robberies, they could all receive the death penalty.*

(iii) Louis Joseph Turck, alias Luigi Furchiano, alias Josephy Farino, alias Glenn Hooper, alias Joe Moreno, an ex-convict with a felony record dating from 1941, was arrested May 20, 1961, for robbery. He had used guns in prior robberies in other states but simulated a gun in the robbery here. He told investigating officers that he was aware of the California death penalty although he had been in this state for only one month, and said, when asked why he had only simulated a gun, "*I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber.*"

(iv) Ramon Jesse Velarde was arrested September 26, 1960, while attempting to rob a supermarket. At that time, armed with a loaded .38 caliber revolver, he was holding several employees of the market as hostages. He subsequently escaped from jail and was apprehended at the Mexican border. While being returned to Los Angeles for prosecution, he made the following statement to the transporting officers: "I think I might have escaped at the market if I had shot one or more of them. *I probably would have done it if it wasn't for the gas chamber.* I'll only do 7 or 10 years for this. I don't want to die no matter what happens. you want to live another day."

(v) Orelius Mathew Stewart, an ex-convict, with a long felony record, was arrested March 3, 1960, for attempted bank robbery. He was subsequently convicted and sentenced to the state prison. While discussing the matter with his probation officer, he stated: "The officer who arrested me was by himself, and if I had wanted, I could have blasted him. *I thought about it at the time, but I changed my mind when I thought of the gas chamber.*"

(vi) Paul Anthony Brusseau, with a criminal record in six other states, was arrested February 6, 1960, for robbery. He readily admitted five holdups of candy stores in Los Angeles. In this series of robberies he had only simulated a gun. When questioned by investigators as to the reason for his simulating a gun rather than using a real one, he replied that *he did not want to get the gas chamber.*

(vii) Salvador A. Estrada, a 19-year-old youth with a four-year criminal record, was arrested February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officers: "I want to ask you one question, do you think they will repeal the capital punishment law. *If they do, we can kill all you cops and judges without worrying about it.*"

(viii) Jack Colevris, a habitual criminal with a record dating back to 1945, committed an armed robbery at a supermarket on April 25, 1960, about a week after escaping from San Quentin Prison. Shortly thereafter he was stopped by a motorcycle officer. Colevris, who had twice been sentenced to the state prison for armed robbery, knew that if brought to trial, he would again be sent to prison for a long term. The loaded revolver was on the seat of the automobile beside him, and he could easily have shot and killed the arresting officer. By his own statements to interrogating officers, however, *he was deterred from this action because he preferred a possible life sentence to death in the gas chamber.*

(ix) Edward Joseph Lapienski, who had a criminal record dating back to 1948, was arrested in December 1959 for a holdup committed with a toy automatic type pistol. When questioned by investigators as to why he had threatened his victim with death and had not provided himself with the means of carrying out the threat, he stated, "*I know that if I had a real gun and killed someone, I would get the gas chamber.*"

(x) George Hewlitt Dixon, an ex-convict with a long felony record in the East, was arrested for robbery and

kidnapping committed on November 27, 1959. Using a screwdriver in his jacket pocket to simulate a gun, he had held up and kidnaped the attendant of a service station, later releasing him unharmed. When questioned about his using a screwdriver to simulate a gun, this man, a hardened criminal with many felony arrests and at least two known escapes from custody, indicated his fear and respect for the California death penalty and stated, "*I did not want to get the gas.*"

(xi) Eugene Freeland Fitzgerald, alias Edward Finley, an ex-convict with a felony record dating back to 1951, was arrested February 2, 1960, for the robbery of a chain of candy stores. He used a toy gun in committing the robberies, and when questioned by the investigating officers as to his reasons for doing so, he stated: "I know I'm going to the joint and probably for life. *If I had a real gun and killed someone, I would get the gas. I would rather have it this way.*"

(xii) Quentin Lawson, an ex-convict on parole, was arrested January 24, 1959, for committing two robberies, in which he had simulated a gun in his coat pocket. When questioned on his reason for simulating a gun and not using a real one, he replied that *he did not want to kill someone and get the death penalty.*

(xiii) Theodore Roosevelt Cornell, with many aliases, and ex-convict from Michigan with a criminal record of 26 years, was arrested December 31, 1958, while attempting to hold up the box office of a theater. He had simulated a gun in his coat pocket, and when asked by investigating officers why an ex-convict with everything to lose would not use a real gun, he replied, "*If I used a real gun and shot someone, I could lose my life.*"

(xiv) Robert Ellis Blood, Daniel B. Gridley, and Richard R. Hurst were arrested December 3, 1958, for attempted robbery. They were equipped with a roll of cord and a toy pistol. When questioned, all of them stated that they used the toy pistol because *they did not want to kill anyone, as they were aware the penalty for killing a person in a robbery was death in the gas chamber.*

Supreme Court, U. S.
FILED
DEC 10 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

STATE OF NORTH CAROLINA.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION AS *AMICUS CURIAE*

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1974
No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

STATE OF NORTH CAROLINA.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION AS *AMICUS CURIAE*

This brief of the National Alliance Against Racist and Political Repression (the Alliance) as *Amicus curiae* in support of petitioner is filed with the written consents of the parties which have been filed with the Clerk.

THE INTEREST OF THE AMICUS CURIAE

The Alliance, founded in 1973, is a multiracial organization composed of local branches, affiliated national organizations and individual members throughout the United States. Its purpose is to work for the elimination

of racist and political repression from our national life by means of activity in the fields of education, legislation and legal defense. It is particularly concerned with manifestations of racism in the criminal process and the penal system. From its inception, it has opposed the death penalty both as cruel and unusual punishment and because, as applied, it discriminates against Blacks, persons of Latin-American origin, Asians, Native Americans and the poor.

The Alliance has designated North Carolina for special attention. For it believes that the state, once regarded as an exemplar of the "New South," is today the scene of repressive practices more comprehensive in nature than in any other area of the country. This is exemplified by the act of judicial legislation on the part of the Supreme Court of North Carolina in reinstating mandatory death sentences in the state in 1973, and by the fact that of some 185 persons under sentence of death in the United States as of November 29, 1974,[1] 65 are on death row in North Carolina, and that of the latter, 40 are Black and 5 are Native Americans.[2]

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1. Information supplied by NAACP Legal Defense and Educational Fund, Inc.

2. All data in this brief with respect to the present inmates of death row in North Carolina has been compiled from information furnished the Alliance by the North Carolina Department of Correction.

ARGUMENT

THE STATUTE UNDER WHICH PETITIONER WAS SENTENCED VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS FOR THE REASON THAT CAPITAL PUNISHMENT, AS IMPOSED AND EXECUTED UNDER A STATUTE MAKING DEATH MANDATORY FOR MURDER, DISCRIMINATES AGAINST BLACKS.

Capital punishment is cruel and unusual in the constitutional sense or denies the equal protection of the laws if it is imposed and executed in a manner that discriminates against Blacks or other racial minorities or the poor.[3] This was common ground for seven of the Justices in *Furman v. Georgia*, 408 U.S. 238, 256-57 (opinion of Justice Douglas), 310 (opinion of Justice Stewart), 364-66 (opinion of Justice Marshall), 389, n. 12 and 448-50 (opinions of the Chief Justice and Justice Powell, in each of which the other three dissenting Justices joined).[4]

The North Carolina statute under which petitioner, a Black, was sentenced and which, as construed by the Supreme Court of that State, made the death penalty mandatory for murder is unconstitutional because, as applied, it violates this principle of non-discrimination.

In what follows we show, first, that there is a gross disproportion of Blacks among those sentenced and executed for murder in North Carolina and throughout the United States. We then examine the causes of the

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3. The grant of certiorari to consider the constitutionality of petitioner's death sentence under "the Eighth or Fourteenth Amendment" (pet. for cert., p. 2) includes the equal protection question.

4. Justices Brennan and White did not reach this issue.

disproportion and show that each of them is rooted in racial discrimination. We further show that such discrimination occurs without significant difference whether the death sentence is mandatory or is discretionary with the jury.

We are convinced that capital punishment, as imposed and executed, likewise discriminates against other racial minorities and the poor. But since, as to them, the available statistical evidence is inadequate,[5] we confine the demonstration to Blacks.

A. The disproportion of Blacks among those on whom the death sentence is imposed and executed.

It is indisputable that the proportion of Blacks among persons executed for murder has been many times larger than their relative number in the population. This is the case for the United States as a whole, for the South, and for North Carolina. In the period from 1930 to the 1967 moratorium, Blacks never constituted more than 11.1% of the nation's population, 24.7% of that in the South and 29% in North Carolina.[6] Yet, of all those executed for murder in the same time span, Blacks constituted 48.8% for the United States, 67.5% for the South and 71.9% for North Carolina.[7]

5. E.g., the official prisoner statistics include persons of Latin American origin among "whites."

6. Percentages from U.S. Census of Population, 1970, and for the South prior to 1960, from Historical Statistics of the United States, Colonial Times to 1957. The per cent of Blacks in the U.S. population increased from 9.7 % in 1930 to 11.1 % in 1970. In the South, it decreased from 24.7 % to 19.9 % in the same period. In North Carolina, the decrease was from 29 % to 22.2 %. *Ibid.*

7. Percentages from National Prisoner Statistics, No. 46, Capital Punishment, 1930-1970 (1971), hereafter cited as "Prisoner Statistics," Table 4, pp. 12-13. The numbers of Blacks on which the percentages were calculated were 1630 for the U.S., 1231 for the South and 149 for North Carolina. The percent of Blacks among those executed for all crimes is considerably higher than for murder alone – 53.5 % for the U.S., 71.9 % for the South and 75.7 % for North Carolina. The difference results from the very high percent of Blacks among those executed for rape in the South – 89.8 % for the region and 87.2 % for North Carolina. *Ibid*

The dissenting Justices in *Furman* suggested (pp. 390, n. 12, and 450) that this 37 year overview does not reflect what was assumed to be a different contemporary pattern resulting from the ban on systematic exclusion of Blacks from jury service and enforced segregation in the South. A closer look at the figures, however, establishes that this assumption is groundless and that the gross disproportion in the number of Blacks executed for murder persisted without substantial change throughout the 37 year period preceding the 1967 moratorium. This appears from the following table showing the per cent of Blacks among those executed for murder in the United States, the South and North Carolina for each decade since 1930:

	U.S.[8]	South[9]	N.C.[10]
1930-39	45.4[11] (687)	69 (486)	70 (75)
1940-49	56 (595)	71.7 (387)	72 (58)
1950-59	46.6 (280)	63.1 (188)	64 (9)
1960-67	43.9 (68)	60.8 (45)	---

8. Prisoner Statistics, Table 1, p. 8.

9. Bowers, Executions in America (1974), hereafter cited as "Bowers", Table 2-6, p. 57. The figures are for non-whites and include 4 American Indians and 22 Mexican-Americans.

10. Compiled from data in Bowers, Appendix A, pp. 200, 319-31 which list no executions for murder subsequent to 1957.

11. Figures in parentheses denote the number of Blacks executed. There are discrepancies between the number of executions reported in Prisoner Statistics and in the data employed by Bowers. But these do not significantly affect the percentages shown in the table. See Bowers, pp. 64-68. Prisoner Statistics does not publish a state or regional breakdown of its figures for executions of Blacks by years.

These figures reveal a dramatic decline in the number of executions in the 50's and 60's. But they demonstrate that the per cent of Blacks among those executed remained substantially constant during each of the four decades. The slight decline in the percentages shown for the South and North Carolina in the last two decades reflects the out-migration of Blacks during that period, not the factors alluded to in the *Furman* dissents. See Bowers, op. cit., p. 58, and n. 6, *supra*.

The conclusion that the disproportion in the number of Blacks sentenced to death for murder has not declined in recent years is confirmed by the racial composition of prisoners who in 1970 were on death row for murder, as shown in the following table:[12]

	Total	Non-white	% Non-white
U.S.	517	252	48
South	228	134	58.7
N.C.	10	6	60

A similar disproportion is evident among the 224 persons who were sentenced to death in the United States in 1969-1970 (201 for murder). Of these, 107 or 47.8% were Black.[13]

Finally, as of November 29, 1974, approximately 185 persons were on death row in the United States, having been sentenced subsequent to the decision in *Furman*. Of

12. Prisoner Statistics, Table 13a, p. 46. The table does not list Blacks separately, but the number of other "non whites" — i.e., American Indians and Asians — is not statistically significant. Prisoner Statistics ceased publication in 1971 and no comparable official statistics have been issued since.

13. Prisoner Statistics, p. 1. No breakdown is given for Blacks sentenced for murder.

these, 107 or 57.8% are Black.[14] 65 of the 185 were sentenced in North Carolina, and of these 40 or 61.5% are Black and 5 or 7.7% are American Indian.[15]

The statistical evidence reviewed above demonstrates that the gross disproportion in the number of Blacks on whom the death penalty for murder has been imposed and executed is not an historical phenomenon associated with discriminatory laws and practices no longer in effect but that it currently persists undiminished. Turning then to the causes of the disproportion, we show in what follows that they exist 1) in the discriminatory administration of capital punishment, 2) in poverty produced by economic discrimination and 3) in other forms of racial discrimination that breed disobedience to white authority.

B. *The causes of the disproportion.*

1. *Racial discrimination in the administration of capital punishment.*

There is reason to believe that discrimination against Blacks in the administration of capital punishment for murder occurs at every stage of the criminal process. See, e.g., Bowers, pp. 104-06. The evidence is irrefutable of its existence in post-conviction proceedings. For it establishes that among those who receive a death sentence for murder, a Black is far more likely to be executed than a white.

A study of the execution rates of persons committed to death row for murder in North Carolina from 1909 to 1954 shows that while 43.8% of the whites were executed, the rate for Blacks was 62%. Johnson, Selective Factors in Capital Punishment, 36 Social Forces, 165, 169 (1957). A

14. See No. 1, *supra*.

15. See n. 2, *supra*.

study for New Jersey covering the years 1937-1961 concludes that, "while the probability that a white man convicted of capital murder will be sentenced to death is 3 out of 10, the probability for a Negro man is almost 5 out of 10." Bedau, Death Sentences in New Jersey, 19 Rutgers L. Rev. 1, 59 (1964). Again, a Pennsylvania study for the years 1914-1958 concludes: "It is the Negro felony murderer more than any other type of offender who will suffer the death penalty. Especially is this finding striking when we note that nearly three times more white (17.4%) than Negro (6.3%) felony murderers have their sentences commuted. Wolfgang, Kelly & Nolde, The Executed and the Commuted on Death Row, 53 J.C.L.C. & P.S., 301, 306 (1962).

The evidence is thus compelling that the disparity in the execution rate for Blacks as compared with whites has been and continues to be a product of racial discrimination, perhaps less blatant today than formerly, but no less operative. The evidence is likewise compelling that the degree of discrimination is not significantly affected by the substitution of a mandatory sentence for one discretionary with the jury, or vice versa.

In North Carolina, the death penalty for murder was mandatory until 1949 when the law was amended to permit an alternative life sentence upon the recommendation of the jury. In the 39 years from 1910 to 1949 when death was mandatory, 75.5% of those executed for murder were Black. In the 12 years from 1949 to 1961 when death was discretionary, the proportion of Blacks declined to 71.4%. Bowers, Table 3-11, p. 96. In 1973, *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, reinstated the mandatory penalty, which has since remained in effect under that decision or under the statute as amended by the legislature,

effective April 8, 1974. There have been no executions since *Waddell*. But of the 44 persons committed to death row for murder since that decision, 30 or 68.2% are non-white (26 Blacks and 4 American Indians) compared with 60% non-whites on death row in 1970 when death was discretionary. (See no. 2 and p. 6 , *supra*.)

In North Carolina then, it appears that the disproportion of Blacks both among those sentenced to death and among those executed is greater under mandatory than under discretionary sentencing.

Bowers, pp. 91-97, compares the executions for murder under mandatory and discretionary sentencing in four other states which have had experience with both. He finds that in New Jersey and Pennsylvania, as in North Carolina, the per cent of Blacks among the executed declined under discretionary sentencing while in Ohio and Virginia the per cent increased. He concludes that while, in all cases, the total number of executions declines under discretionary sentencing, the evidence "suggests that discretionary sentencing alone bears only marginal responsibilities for the arbitrariness and discrimination that has characterized the administration of capital punishment in recent years."

The petition for certiorari (pp. 28-44) demonstrates that a mandatory statute allows leeway for avoidance of the death penalty at each stage of the criminal process from indictment to executive clemency. The available evidence does not permit pinpointing the stages at which the exercise of discretion is most frequently swayed by racial considerations. See Bowers, pp. 72-75. However, the North Carolina, New Jersey and Pennsylvania studies reviewed above conclusively demonstrate the discriminatory treatment of Blacks in the post-conviction disposition of death sentences for murder. Since post-conviction proceedings are the same for mandatory as for

discretionary sentencing, the result of these studies applies to both procedures. Moreover, in the case of the North Carolina study, mandatory sentencing was in effect for 40 of the 45 years covered (1909-1954). These studies thus confirm the conclusion that the reinstatement of mandatory sentencing in North Carolina has no tendency to lessen racial discrimination in the administration of capital punishment.

2. *Economic discrimination against Blacks.*

There is a paucity of statistical information on the economic status of persons convicted of capital crimes. But the studies which have been made bear out the first-hand observations of men like the warden of Oregon's state prison that, "only the poor get executed. The wealthy never are." Bedau, Capital Punishment in Oregon, 45 Oregon L. Rev. 1, 13 (1965). For similar statements by others, see Bedau, in Rutgers L. Rev., op. cit., p. 27.

The North Carolina study discussed above found for the years 1940-1954 that while 20% of the gainfully occupied in the state were employed as farm laborers, foremen, and other laborers, 50% of those committed to death row were in this category. At the other end of the scale, professional, technical and kindred workers who formed 3.6% of the population were not represented on death row. And managers, officials and proprietors formed 7.3% of the whole population but only 2.2% of the population of death row. The study further found that during the same period, the mean years of schooling for the state's population as a whole was 7.47, while it was only 4.65 for those on death row. Johnson, op. cit., p. 168. Similar studies for New Jersey and Oregon yielded like results. See Bedau in Rugers L. Rev., op. cit., p. 26; Bedau in Oregon L. Rev., op. cit., p. 13.

Evidence is lacking to assign relative weights to the

factors which account for the high incidence of the poor among recipients of the death sentence. Their inability to secure the kind of skilled legal representation available to persons of means is obviously important. See Bedau in Oregon L. Rev., op. cit., p. 13. The high rate of crime among the poor also bulks large. As Justice Powell observed in *Furman*, p. 447 (dissenting opinion), "The 'have-nots' in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens."

Statistical confirmation of this observation is presented in Survey of Inmates of Local Jails 1972, Advance Report, prepared by the Federal Law Enforcement Assistance Administration (hereafter the "FLEAA Survey"). It shows that of 141,600 inmates of jails in 1972, 44% had annual pre-arrest incomes of less than $2,000, 55% of less than $3,000, and that only 10% had incomes in excess of the $9,255 U.S. median. 4 out of every 10 inmates in pretrial status were unemployed when committed, 3 of them for more than a year. 42% of the inmates were Black, almost four times their percentage in the population as a whole. FLEAA Survey, pp. 3, 4 and Table A, p. 16.

Poverty thus is a major correlate of crime. And while, as we later show, it does not alone account for the high crime rate among Blacks it plainly bears primary responsibility for that rate. But Black poverty is itself a consequence of racial discrimination.

For over one-third of the nation's Blacks, blackness is synonymous with poverty. In 1969, 35% of the Black population, as against 9% of the white Anglo population, had incomes below the poverty level, then officially defined as less than $3,000 a year. Moreover, the Black poor are poorer than the white. The "mean income deficit" of the former was $1,832 and of the latter $1,427. The extent of

Black poverty and the disparity between Black and white incomes also appears from the fact that in 1969 the per capita income of Blacks was $1,818 or 54% of the $3,838 per capita income of white Anglos. The discrepancy was even greater in North Carolina where the figure for Blacks was $1,151 or 46% of the $2,516 for whites. Perlo, Economics of Racism (International Publishers, N.Y., to be published Feb., 1975), Chap. III and Tables III-3 and III-IV.[16]

The comparative figures on unemployment provide a further index of Black poverty and of the Black-white differential in economic status. Over the past 25 years, the unemployment rate among Blacks has been twice that of whites. Thus in the decade 1964-1973, the rate for whites was 4.09% but 8.26% for Blacks. Perlo, op cit., Table VI-VII citing BLS Handbook of Labor Statistics, 1973. Unemployment among Black youth is far more severe. A report by the Twentieth Century Fund, Youth Unemployment: Crisis in the Cities (1971) describes it as follows:

> "As against a white adult unemployment rate of 5 per cent in March, 1971, the overall rate of Black teenage unemployment was 30.3 per cent — or six times greater. In the poverty areas it was 41.2 per cent. For Black adults between the ages of twenty and twenty-four, the unemployment rate was 16.5 per cent.
>
> "Even so, the official figures do not portray the extent of the problem. An additional number of ghetto jobless are never found by the enumerators. At the very least, 100,000 young Black people —a most conservative estimate—have given up hope and have stopped looking for jobs."

16. The data in Perlo referred to in the text are based on the U.S. Census, 1970.

The extent and depth of Black poverty relative to that of whites is a consequence of racial discrimination.

That there is discrimination against Blacks in employment is indisputable. It was recognized by Congress in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, which established the Equal Employment Opportunity Commission. Eight years later, Congress passed the Equal Employment Opportunity Act, P.L. 92-261, providing for the judicial enforcement of Commission Orders. The House report on this legislation (H.Rep. No. 92-238, 1972 U.S. Code Cong. and Adm. News, pp. 2137, 2139-41) states:

> "[The Civil Rights Act of 1964] recognized the prevalence of discriminatory employment practices . . . which [were] found to pervade our system . . .
>
> "During the first 5 years of its existence, the Commission has received more than 52,000 charges. Of these, 35,455 were recommended for investigation. Of this number, 56% involved complaints of discrimination because of race . . .
>
> "The number of charges is increasing. The incidence of discrimination does not appear to be waning.
>
> "The impact of the Commission's inability to obtain relief from employment discrimination is reflected in an examination of statistics showing the distribution of minorities in occupational groups. While the tables show some improvement since 1964, minority groups are not obtaining their rightful place in our society. . .[17]

17. Discrimination in employment is reflected even more sharply in the wage differentials between Black and white males in the same occupation or with the same educational qualifications. In both cases, Blacks, on the average, are paid one-third less than their white counterparts. Perlo, op. cit., chap. III and Table III-7.

> "Enactment of this bill will not automatically end employment discrimination in this country. The bill offers no panaceas or guarantees of success."

Again, the 1974 Economic Report of the President accepts as a matter of course both that there is a prevailing Black-white wage differential that is racially discriminatory and that the differential is a source of profit to employers. The Report states (pp. 151-52, emphasis supplied:)

> "First, the American economy is highly competitive, and business firms whose owners or white workers have *less* discriminatory attitudes toward blacks will be likely to employ more blacks. These firms prosper if blacks receive lower wages. When such firms expand, the demand for black workers increases and the discriminatory differential *declines*."

It follows from what has been said that: 1) the disproportionate number of Blacks who receive the death sentence is, in part, a reflection of the high rate of crime, capital offenses included, among them; 2) the high crime rate, in turn, reflects the high rate of Black poverty; 3) the high rate of poverty among Blacks is a consequence of racial discrimination. Hence, to the extent that the high rate of Black poverty accounts for the disproportionate number of Blacks who commit capital crimes, the disproportion is a consequence of racial discrimination.

3. *Racial discrimination breeding disobedience to white authority.*

The relevant statistics indicate that poverty does not bear exclusive responsibility for the high rate of crime among Blacks. Blacks constitute 11.1% of the U.S. population

and 28.3% of all those below the official poverty level.[18] If poverty were the sole cause of the high crime rate among Blacks, one would expect them to constitute approximately 28% of those charged with or convicted of crime. Yet, as has been shown above, Blacks make up 42% of the inmates of jails. The fact that their proportion among the latter is half again as great as their proportion among the poor strongly suggests that factors in addition to poverty share a measure of responsibility for the high Black crime rate.

An important additional factor is a further reflection of the fact that, "Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years." *Milliken v. Bradley*, ——U.S.——, 41 L. Ed. 1069, 1131 (dissent of Justice Marshal). One consequence of these attitudes is described in Silberman, Crisis in Black and White (1964), pp. 50-53:

> "And the odds are small indeed that a Negro child can grow up without being abused or patronized, without being convinced by a hundred big and small humiliations, that he has no worth and no chance . . .
>
> "And if the child should grow up somehow without confronting prejudice and discrimination directly, he meets it soon enough as an adult . . . The police are an ever-present threat; there is hardly a Negro community in the United States which does not regard the local police with suspicion, if not with hate . . .
>
> "The occasional acts of police brutality, however, hurt less than the constant flow of petty indignities — indignities that seem to demonstrate, a dozen times a year, that no matter what the

18. 1970 Census, Summary C, Table 95 (preliminary volume).

> Negro does, no matter what he achieves, no matter what he is, the white world will never accept him.
>
> "This sense of rejection by American society, a sense which dominates the lower-class Negro's life, tends to destroy his feeling of responsibility to law and authority. Law and authority are always white and middle class and always seem designed to keep the lower-class Negro in his place."

To the extent then that a lack of a "feeling of responsibility to law and authority" accounts for the high rate of crime among Blacks, that too is a product of racial discrimination.

C. *The weight and constitutional effect of the evidence of racial discrimination.*

It has been demonstrated above that capital punishment for murder is imposed and executed in North Carolina and elsewhere in a manner that discriminates against Blacks. We have identified the principal sources of the discrimination. It resides within the criminal process and is definitely identifiable in the post-conviction disposition of death sentences. It resides in economic discrimination, resulting in poverty far deeper and more pervasive than exists among whites. It resides also in the multiform practices of white supremacy that affront Black dignity and erode respect for and obedience to white authority. It has also been shown that racial discrimination in the administration of capital punishment exists without significant difference of degree under both mandatory and discretionary sentencing procedures.

It will be said that the proof here adduced is not conclusive. But proof of the causation of a complex social phenomenon can never attain that degree of certainty. Surely, the proof is sufficient to establish a prima facie case

and shift the burden to those who deny that racial discrimination is the cause of the disproportion in the number of Blacks on whom capital punishment is imposed and executed. The proof here is at least as cogent as that required to make out a prima facie case of racial discrimination in the selection of a jury. *Alexander v. Louisiana*, 405 U.S., 625, 630-32 and cases there cited. Certainly, no more should be required where lives are at stake.

Justice Douglas recently wrote that, "Cases which have come to this Court depict a spectacle of slavery unwilling to die." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445. Responsibility for the prolongation of its life rests with every institution of white society, social, economic and governmental, not excluding this Court. See, e.g., *Civil Rights Cases*, 109 U.S. 3; *Plessy v. Ferguson*, 163 U.S. 537; *Grovey v. Townsend*, 295 U.S. 45.

Capital punishment, in the inequality of its impact upon Blacks, presents the Court with another manifestation of the spectacle to which Justice Douglas referred.

It will be said, however, that the argument cuts too deep and if carried to the limit of its logic would invalidate imprisonment along with death as an unconstitutional punishment. See *Furman*, p. 447 (dissent of Justice Powell). But there is a qualitative difference between the two, a difference with constitutional dimensions as wide as the distance from life to death.

Consider the savage results of the reinstitution of the mandatory death penalty in North Carolina:

1. In the 22 months following *Waddell* 65 persons (as of November 29, 1974) have been committed to death row (44 for murder) compared with 10 for the full two year period 1969-1970 when death was discretionary. See n. 2, *supra*, and Prisoner Statistics, Tables 7 and 7a, pp. 21, 23.

2. 40 of the 65 are Black. Of these, 10 (25%) were 20 years of age or less when committed; 27 (67.5%) were under 25, and 31 (77.5%) were under 30.[19] See n. 2, *supra.*

3. Data on prior criminal records are available for 53 of the 65. 29 (54%) of these have no previous record.[20] Of those convicted of murder, data are available for 37, of whom 21 (56.7%) have no previous record. See no. 2, *supra.*

3. "[C]riminals spared from death who are released after a term of years have better records on the whole than released prisoners in general." Wechsler in Symposium on Capital Punishment, 7 N.Y.L. Forum, 250, 254 (1961). A murderer tends to be a model prisoner who "is not nearly so great a danger to the prison community, nor to the outside world when he is paroled or pardoned, as are many other classes of prisoners, who are regularly released after serving much shorter terms of imprisonment." Sellins, the Death Penalty; Report for ALI Model Penal Code Project (1959).

4. On past performance in North Carolina, of the 26 Blacks committed for murder, 16 (62%) will be executed if the Court does not invalidate their sentences. See n. 2, *supra.* and Johnson, op. cit., p. 169.

It thus appears that a majority of those slated for execution for murder in North Carolina are young Blacks, the cruelest victims of racist economic discrimination, with no previous criminal records who, if allowed to live, would be unlikely to commit another felony. It is submitted that a

19. They were, of course, still younger when the crimes were committed.

20. Of the 113 persons *executed* in North Carolina in the years 1940-1954, 49.6% had no previous record. Johnson, op. cit., p. 169. For similar findings elsewhere, see Carter and Smith, Death Penalty in California, 15 Crime & Delinquency 62, 68-69 (1969).

system of punishment that discriminates by selecting such persons for execution, denying them an opportunity for rehabilitation, is cruel and unusual within the meaning of the Eighth Amendment and violates the equal protection clause of the Fourteenth.

CONCLUSION

The judgment below, insofar as it affirmed the death penalty, should be reversed.

Respectfully submitted,

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DEC. 13 1974
MICHAEL RODAK, JR., CLERK

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-7031

JESSE THURMAN FOWLER,
Petitioner,

v.

STATE OF NORTH CAROLINA
Respondent.

BRIEF AMICUS CURIAE

The National Prisoners' Rights Project sponsored by the National Conference of Black Lawyers requested and received consent of the attorneys for both petitioner and respondent to file a brief *amicus curiae* in this case. These letters of consent have been filed with the Clerk of the Court.

The interest of the National Conference of Black Lawyers and its National Prison Project arises from the fact that its organizational purpose is to develop unique, legal remedies to insure the effective implementation of the just demands of Black people for legal, economic and social protection.

In the instant case, petitioner, a Black man, has raised issues concerning the constitutionality of the mandatory death sentences procedures of North Carolina. The Court's resolution of these and other related issues could determine the life or death of the peti-

tioner and another forty persons now under sentence of death in North Carolina pursuant to the challenged procedure. Given the national significance of the issues raised coupled with the fact that a large number of prisoners on Death Row in North Carolina and across this Nation have historically been Black, the National Conference of Black lawyers files this brief *amicus curiae* with the Court.*

SUMMARY OF ARGUMENT

The mandatory penalty of death for first-degree murder and other crimes in North Carolina is a cruel and unusual punishment, because it violates the Due Process Clause of the Fourteenth Amendment. The Cruel and Unusual Punishment Clause of the Eighth Amendment was modeled after the language contained in the English Bill of Rights enacted in 1689; one of the primary purposes of the English provision was to ban severe sanctions which were arbitrarily and discriminatorily imposed by either the legislature or judiciary.[1] Upon cursory inspection, the judicially fashioned mandatory death sentence scheme of North Carolina might appear capable of even-handed application. However, one year ago of the then twenty-one persons awaiting execution in North Carolina, fifteen of those on Death Row were Black, five were white

* The National Conference of Black Lawyers wishes to acknowledge the support and endorsement it received in filing this brief from the SOUTHERN POVERTY LAW CENTER, INC. located in Montgomery, Alabama and its General Counsel, Joseph J. Levin, Jr.

[1] Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839, 845-846 (1969).

and one was an American Indian.[2] It might be argued that these statistics alone establish a *prima facie* case of purposeful discrimination on the part of the State. Additional evidence consisting of statistics, studies and reports will demonstrate that there exists a differential sentencing pattern correlated with racial background and that a disproportionate number of Blacks receive sentences of death. Consequently, there must develop a strong, almost inescapable, inference that the mandatory death sentence procedure of North Carolina will perpetuate an historic, institutionalized pattern of discrimination in the imposition of the death penalty.

In addition to the constitutionally intolerable method of administering the sentence of death, the execution itself constitutes cruel and unusual punishment as prohibited by the Eighth Amendment. The mode of executing a death sentence in North Carolina consists of "causing the . . . felon to inhale lethal gas of sufficient quantity to cause death . . . ."[3] This procedure which causes physical discomfort and pain prior to actual death as well as the mental anguish and suffering which accompany survival while under sentence of death[4] are inconsistent with human dignity which is a basic concept underlying the Cruel and Unusual Punishment Clause.[5]

This case presents with striking clarity the fun-

[2] King, "Death Rows: 44 May Avoid Execution," *New York Times*, December 30, 1973, p. 42, col. 1.

[3] N.C. Gen. Stat. §15-188.

[4] *Furman v. Georgia*, 408 U.S. 238, 288 (1972).

[5] *Trop v. Dulles*, 356 U.S. 86 at 100 (1958).

damental contradiction between constitutional principle and the process by which a state statute operates as a tool of racial discrimination. The issue is whether this Court will compel compliance with its decision in *Furman v. Georgia*, 408 U.S. 238 (1972), or endorse a system of justice which degrades and dehumanizes Blacks by negating their most basic human right—the right to survive.

ARGUMENT

I. THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In order to establish the procedural posture of this case, it is necessary to briefly outline the sequence of events which resulted in petitioner filing his application for review of this case with the Court. This case and its companion cases in which certiorari has either been granted or is pending[6] illustrate a variety of methods whereby retentionist[6.1] states have attempted

[6] *Dilliard v. North Carolina*, O.T. 1973, No. 73-
Crowder v. North Carolina, O.T. 1973, No. 73-
Henderson v. North Carolina, O.T. 1973, No. 73-
Jarrette v. North Carolina, O.T. 1973, No. 73-
Noell v. North Carolina, O.T. 1973, No. 73-
Eberheart v. Georgia, O.T. 1974, No. 74-5174

[6.1] See footnote 12, *infra*.

to reinstate the death penalty after *Furman* despite a strong national resistance to its frequent and routine application.

On June 29, 1972, this Court ruled in *Furman v. Georgia, supra*, that the death penalty as written and administered in the cases before the Court constituted cruel and unusual punishment. Following the decision in *Furman*, the Supreme Court of the state of North Carolina had an opportunity to review the constitutionality of its capital punishment laws which had been in effect prior to June 29, 1972 in the case of *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973). All seven of the Justices of the Court agreed that the North Carolina statute which authorized imposition of the death penalty in the case of convictions for the crimes of first-degree murder, rape, first-degree burglary, and arson while also affording the jury the unlimited discretion to recommend the sentence of life imprisonment,[7] suffered from the same constitutional infirmity which this Court had diagnosed in *Furman*. As a curative measure, a majority of four Justices held that solely by amputation of the jury recommendation provision which had been added by legislative action of the North Carolina General Assembly in 1947 and 1949 the constitutional defect would be remedied. Thus the *Waddell* court, over the dissent of three Justices,[8] created a law which re-

[7] N.C. Gen. Stat. §14-17.

[8] A dissenting opinion stated: "BOBBITT, C.J., and HIGGINS and SHARPE, J.J., dissent as to the death sentence and vote to remand for imposition of a sentence of life imprisonment for the reasons stated in the dissenting opinion of Chief Justice Bobbitt in *State v. Jarrette*, N.C., 202 S.E.2d 731 (1974)" 203 S.E.2d at 9.

sembled a prior unamended version of the North Carolina death penalty statute by stating:

> (T)he punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may *not* instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constitutent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court *must* pronounce a sentence of death. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19, at 28-29 (1973) (emphasis added).

Since January 18, 1973, the date when the *Waddell* procedures were handed down, and April 8, 1974, the date of the enactment of a new North Carolina death penalty statute,[9] forty-one persons have been sentenced to death in North Carolina.[10] As of the date of the filing of the *Fowler* petition, the state of North Carolina merited the infamous distinction of having sentenced to death one-third of the national total of 121 defendants condemned to death subsequent to the *Furman* decision.

Having granted certiorari in the *Fowler* case, this

[9] S.B. 157, Chap. 1201, 1973 Sess. (2nd Sess. 1974)

[10] For a list of the cases involving sentences of death, see footnote 5, p. 11 of the *Fowler* petition and footnote 28, pp. 29-31 of the *Dilliard* petition.

Court must squarely confront the central issue of the federal constitutionality of the North Carolina death sentence procedure enunciated by the *Waddell* court. It is significant to note that although 23 states have reinstated the death penalty by legislative action after *Furman*, only one state other than North Carolina has used judicial review as the method of accomplishing this purpose.[11] The importance of this Court's decision concerning the unique mandatory death sentence procedure operative in North Carolina subsequent to *Furman* can not be over emphasized, since the ruling issued by this Court could literally decide the life or death of the forty-one men and women under sentence of death in North Carolina pursuant to the challenged procedure.

A. THE PENALTY OF DEATH IMPOSED PURSUANT TO THE POST WADDELL SCHEME CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT BECAUSE IT IS IMPOSED IN A SELECTIVE AND ARBITRARY MANNER

It has long been established that the Eighth Amendment proscribes the legislative enactment or judicial imposition of cruel and unusual punishments. *Weems v. United States*, 217 U.S. 349, 366, 378-379, 382 (1910); *Trop v. Dulles*, 356 U.S. 86, 103-104 (1958) (plurality opinion of Chief Justice Warren); *Robinson v. California*, 370 U.S. 660 (1962); and *Furman v. Georgia*, 408 U.S. 238, 241 (1972) (concur-

[11] See *Fowler* petition footnotes 7, 8, 9 and 14 at pp. 12-15 and p. 19 for an exhaustive discussion of the various post *Furman* statutes authorizing the punishment of death.

ring opinion of Justice Douglas). The Cruel and Unusual Punishment Clause of the Eighth Amendment is made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California, supra; Furman v. Georgia, supra* at 257 (concurring opinion of Justice Brennan). The difficulty of defining with exactness and precision the meaning of the Cruel and Unusual Punishment Clause was apparent in the *Furman* decision. Although each of the Justices who formed the majority in *Furman* filed separate concurring opinions, and none joined in the opinion of any other, the common theme woven into the fabric of each opinion is that a system of capital punishment which is characterized by the arbitrary selectivity in the administration of the death penalty is unconstitutional. Death sentences which are "wantonly and . . . freakishly imposed," 408 U.S. at 310, under a scheme devoid of clear standards is violative of the Eighth and Fourteenth Amendments. The very evil against which the Eighth Amendment stands, namely, the arbitrary and capricious imposition of harsh penalties,[12] is inherent in the North Carolina procedure approved in the *Waddell* decision.

Whether the North Carolina procedure challenged in the *Fowler* petition can be viewed in any meaningful sense as capable of evenhanded, nondiscriminatory application is central to the resolution of the issues in this case. Careful scrutiny of this purportedly "mandatory" death sentencing system reveals that the same degree of discretion which the Court held constitution-

[12] Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839, 845-846 (1969).

ally impermissible in *Furman* permeates the North Carolina scheme. This conclusion is based upon three interrelating factors: (1) a developing body of statistical studies which document that "Black defendants are disproportionally subjected to this sanction (the death penalty) . . .",[13] (2) the sequence of events which resulted in the development of the *Waddell* procedure, and (3) certain characteristics of North Carolina law and practice.

The most compelling and persuasive body of evidence supporting Fowler's position that the death sentences imposed in North Carolina pursuant to the *Waddell* procedures are unconstitutional consists of numerous statistical studies which, when viewed as a whole, conclusively demonstrate that:

> Strong statistically significant differences in the proportions of blacks sentenced to death, compared to whites, when a variety of nonracial, aggravating circumstances are considered, permit the conclusion that the sentencing differentials[14] are the product of racial discrimination[15]

As early as 1941, researchers began to compile

[13] Wolfgang and Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119 (1973).

[14] Differential means "a degree of statistical difference that was significant according to traditional probability statistics;" here the term means a "disproportionate frequency of Blacks sentenced to death in comparison to whites." Wolfgang, *The Social Scientist in Court*, 65 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 239, 243 (1974).

[15] Wolfgang and Riedel, *Race, Judicial Discretion and the Death Penalty*, 407 ANNALS 119 (1973).

statistics on racial differentials in the use of the death penalty.[16] Since 1930, a national total of 3,859 persons have been executed for a variety of crimes.[17] Although Blacks represent only approximately 10 per cent of the United States population, 54.6 per cent of all executed persons have been Black or members of other racial minority groups.[18] Blacks represent 89.5 per cent of the 455 persons executed for the crime of rape alone.[19]

Broad generalizations about the significance of these statistics alone would not be reliable. For example, with limited empirical data available concerning the effect of racial factors on the criminal justice system prior to conviction, allegations concerning the discriminatory behavior of law enforcement officials

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[16] Johnson, *The Negro and Crime*, 217 ANNALS 93 (1941). Johnson collected data from 220 homicide cases in Richmond, Virginia from 1930-1939 and 330 homicides from 5 counties in North Carolina from 1930 to 1940. This data was distributed according to four possible offender-victim racial combinations, i.e. black offender/white victim, white offender/white victim, black offender/black victim and white offender/black victim. In the black offender/black victim category, there were 141 cases and only 8 sentences of life imprisonment and no death sentences. Out of the 22 cases of black offenders/white victims, 7 defendants received life imprisonment and 6 received death penalty. Johnson concluded: "Negro versus Negro offenses are treated with undue leniency, while the Negro versus white offenses are treated with undue severity." *Id.* at 98.

[17] Wolfgang and Riedel, *supra*, at 123.

[18] *Id.*

[19] *Id.*

would be difficult to maintain.[20] Without focusing on issues relating to the pre-conviction stage of adjudication, empirical evidence has revealed ". . . there are very distinct patterns of behavior which show that racial variables *are* influential in the imposition of the death penalty.[21] It is appropriate for this Court to take judicial notice of this body of empirical information in analyzing the effects of racial and nonracial factors on capital sentencing within the context of the North Carolina *Waddell* scheme.

Methodical and scientific investigation of racial disparities in sentencing for capital offenses has produced the most conclusive findings in studies concerning the crime of rape.[22] Researchers selected nonracial variables which, hypothetically, might explain differential sentencing patterns. However, data collected over several decades for the crime of rape indicates an institutionalized, systematic judicial norm of sentencing which discriminates against Blacks in the imposition and carryng out of the death penalty. For example, Elmer Johnson studied information on persons sentenced to death for rape in North Carolina

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[20] Wolfgang, *The Social Scientist in Court*, 65 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 239, 240 (1974).

[21] Wolfgang and Riedel, *Race, Judicial Discretion and the Death Penalty*, 407 ANNALS 119, 122 (1973) (emphasis authors')

[22] Since 1930, 405 of 455 persons executed for rape were Black; and all of the executions were in Southern or border states or the District of Columbia. Bureau of Prisons, National Prison Statistics, *Capital Punishment 1930-1968*, Bulletin No. 45 (1969).

from 1909 to 1954.[23] Johnson discovered that selective factors influence the final outcome even after a capital offender has been committed to Death Row. Table 2 of the Johnson report shows "(o)nly 23.9 per cent of the forty one first degree burglars entering death row were executed, compared with 56.3 per cent of the 490 murderers and 55.6 per cent of the 126 rapists."[24] Another selective factor which the Johnson report identified was race; he found "Negroes represented 73.8 per cent of all death row inmates, 92.7 per cent of the first degree burglars, 88.7 per cent of the rapists, and 68.5 per cent of the murders."[25] The report concluded that the administration of capital punishment in North Carolina during the period studied was characterized by the absence of "consistency, certainty and principles."[26]

Professor Marvin Wolfgang conducted a statistical investigation to determine the relationship between race and sentencing for rape in eleven Southern and border states where rape was a capital offense.[27] Using an elaborate research design including many variables unrelated to race, Wolfgang tabulated data from seven of the eleven states studied over a twenty year period. The findings and conclusions were uniform in all of the states.

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[23] Johnson, *Executions and Commutations in North Carolina* in BEDAU, THE DEATH PENALTY IN AMERICA, 452 (Rev. ed. 1967)

[24] *Id.* at 454.

[25] *Id.* at 463.

[26] *Id.*

[27] Wolfgang, *supra*, at 239.

> (B)lack defendants whose victims were white were sentenced to death approximately eighteen times more frequently than defendants in any other racial combination of defendant and victim. The probability of such a relationship between sentence of death and black defendants with white victims was, by chance alone, less than one out of a thousand.[28]

Studies have been conducted in various states involving crimes other than rape.[29] Although the approach has been "fragmentary", the results of this information, when viewed collectively, uniformly indicate that "blacks are disproportionately sentenced to death."[30] Thus this Court should declare the North Carolina death sentence procedure unconstitutional, because the sentencing scheme continues to perpetuate an historic pattern of discrimination in the imposition of the death penalty.

Another obvious constitutional flaw in the *Waddell* procedure concerns the fact that, between 1949 when the recommendation section was added to the North Carolina punishment statute and 1974 when the state legislature enacted a new post-*Furman* death sentencing procedure, unknown numbers of men and women convicted of capital offenses fortuitously escaped death by operation of the jury's discretion. Other less fortunate individuals who were convicted of com-

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[28] *Id.* at 242.

[29] See Wolfgang and Riedel, *supra*, footnote 24, p. 124 citing individual state studies.

[30] *Id.*

mitting identical crimes were not selected to survive. It cannot be argued that this totally capricious selection process is outside of the scope of the *Furman* decision. Apparently unable to reconcile the disparate treatment of the class of convicted felons randomly selected to survive and the class of felons who were not recipients of this beneficial treatment, the North Carolina Supreme Court conveniently ignored this issue when it abolished the escape hatch mechanism of the recommendation procedure in *Waddell*. Similarly, the class of all felons convicted of capital crimes after the *Waddell* decision and while this procedure was in effect were arbitrarily targeted by the North Carolina Court as not worthy to survive.

Clearly the judicial severance of the recommendation clause in the pre-*Furman* North Carolina capital punishment scheme could not produce a death sentence procedure free of constitutional defects. The *Waddell* procedure simply underscores the basic impropriety of the pre-*Furman* laws, because the death penalty would continue to be imposed in an arbitrary, and therefore, unconstitutional fashion.

It is appropriate at this juncture to consider whether the elimination of the recommendation section of the pre-*Furman* North Carolina statutes authorizing capital punishment effectively sealed off the escape hatch mechanism and created a uniform, mandatory sentencing scheme. Analysis discloses that the method of administering criminal justice in North Carolina continues to provide avenues of less conspicuous escape from the death penalty at early stages of the process. In North Carolina, as in many other jurisdictions, the prosecutor is accorded wide discretion over the exer-

cise of his authority;[31] he is obligated to "prepare the trial dockets (and) prosecute in the name of the State all criminal actions requiring prosecution in the superior court and district courts of his district." N.C. Gen. Stat. §7A-61 (1971 Cum. Supp.). Generally, the courts have been reluctant to subject the exercise of the prosecutor's discretion to judicial review except in cases of clear and flagrant abuse.[32] The North Carolina Supreme Court in *State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721, 742 (1974) declared: "the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with 'guidelines' that he becomes a mere automation, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike."

There is no effective procedure to review the prosecuting attorney's decision not to seek prosecution; nor can his decision concerning what level of criminal culpability to charge be subjected to any rigorous standard in any forum. The prosecutor is not compelled by any legal standard to charge one of the statutorily enumerated capital offenses based on any given set of facts. Because a local prosecutor is often a product of the community he serves, "he is in a position to adjust prosecutorial policy to local conditions."[33] Consequently, the North Carolina prosecutor

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[31] Miller and Remington, *Procedures Before Trial*, 339 ANNALS 111, 113-120 (1962).

[32] *Id.*

[33] PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967), p. 75.

may "without violating his trust or any statutory policy . . . refuse to (seek) the death penalty no matter what the circumstances of the crime." *Furman v. Georgia, supra* at 314 (concurring opinion of Justice White). Under the *Waddell* procedures, an arbitrary decision of the prosecutor could determine the life or death of an accused man.

The magnified importance of prosecutorial discretion within the context of the *Waddell* "mandatory" capital punishment scheme and the increased potential for this discretion to deteriorate into mere random selection is evident in the area of plea bargaining. The extent to which plea bargaining operates in capital cases in North Carolina is not known, but on a national average an estimated ninety per cent of all criminal cases are resolved in this manner.[34] Plea bargaining is particularly appealing when a capital offense is charged, because a full trial would require a great deal of time to prepare. The North Carolina prosecutor has unbridled discretion to accept a plea to a lesser charge in a capital case. From the prosecutor's perspective, it might be in his interest to accept such an agreement to guarantee conviction. What is particularly offensive under the *Waddell* procedure is "(t)he possibility that innocent defendants might be induced to plead guilty to avoid the possibility of a harsh (mandatory death sentence) should they be convicted after trial."[35]

Other opportunities for selective enforcement of the "mandatory" death penalty are present in the North Carolina system. While the *Waddell* decision

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[34] *Id.* at 9.

[35] *Id.* at 113 (Appendix A)

may have been intended to curtail the jury's discretion in deciding who should receive the death penalty, it may have enhanced irregular, arbitrary and selective verdicts of acquittal. Rather than condemn an individual to death by returning a verdict of guilty on a capital charge, the jury might decide to return a verdict of guilty of a lesser included offense, or it might return a verdict of not guilty. Furthermore, the North Carolina Constitution gives to the Governor the absolute discretion to "grant reprieves, commutations, and pardons . . . for all offenses." Article III, §5(6). The Governor is empowered to exercise this clemency power "as he may think proper." *Id.* During a sixty year span from 1903 to 1963, the Governors of North Carolina liberally exercised the clemency power in over 65 per cent of the cases where the death sentence had been imposed.

Whatever the intent of the *Waddell* Court, the death sentence procedures created under the mandatory scheme can not insure uniform treatment of persons accused of capital offenses. The *Waddell* decision may have limited to some extent the discretionary power of those who sit in the jury box, but this power remains dispersed in other areas of the North Carolina criminal justice system. Some of the officials who continue to exercise virtually unlimited discretionary power over the imposition of the death penalty were not restricted in the exercise of this discretion by the Court's decision in *Waddell*. Therefore, the post-*Furman* North Carolina death penalty practices developed in *Waddell* should be declared unconstitutional.

B. REGARDLESS OF THE PROCEDURAL SYSTEM UNDER WHICH IT IS INFLICTED, THE IMPOSITION OF CAPITAL PUNISHMENT IS EXCESSIVELY CRUEL IN LIGHT OF CONTEMPORARY STANDARDS OF DECENCY AND DIGNITY ENSHRINED IN THE EIGHTH AMENDMENT

The force of the Eighth Amendment is not restricted to repugnant penalties and punishments which were common at the time the Amendment was adopted. *Weems v. United States*, 217 U.S. 349, 372 (1910). The scope of the Cruel and Unusual Punishment Clause is measured by the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

At present, the death penalty is rarely imposed; and its selective application to certain segments of society may indicate a general unwillingness to accept the broad application of this sanction. The fact that minorities and other poor and powerless people consistently have represented the bulk of the Death Row population (See Justice Douglas' concurring opinion in *Furman v. Georgia, supra*, at 249) may raise issues of a "caste" aspect of law enforcement. 408 U.S. at 255. Justice Brennan indicated in his concurring opinion in *Furman* that arbitrary and selective application of an unusually severe sanction constitutes a denial of human dignity. 408 U.S. at 286. Moreover, existing data suggests that there is "no method available that guarantees an immediate and painless death." *Furman v. Georgia, supra* at 287. The physical harm inherent in any form of capital punishment coupled with the severe psychological implications of survival while

under sentence of death create a degrading and dehumanizing process inconsistent with notions of an enlightened and civilized society. At an earlier stage in this Nation's history, flogging, earcropping and banishment were all viewed as accepted forms of punishment. The interpretation of the Cruel and Unusual Punishment Clause of the Eighth Amendment as an expanding concept eventually resulted in the outlawing of all of these practices. This Court must now decide if there is any compelling societal interest outweighing considerations contemporary morality to justify the retention of capital punishment.

CONCLUSION

For these reasons, the Court should review the judgment and opinion of the North Carolina Supreme Court.

Respectfully submitted,

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Attorney for Amicus Curiae

Supreme Court, U. S.
FILED
NOV 15 1974
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-7031

JESSE THURMAN FOWLER,
Petitioner

vs.

STATE OF NORTH CAROLINA,
Respondent

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Counsel of Record
For Petitioner:
David E. Kendall
10 Columbus Circle
New York City, N. Y.

To: The Supreme Court of the United States.

Richard A. Heim respectfully moves for an order granting leave to file a brief amicus curiae in the above-entitled case pursuant to the Revised Rules of this Court. Consent of the STATE OF NORTH CAROLINA has been filed herewith. Consent by the attorney for JESSE THURMAN FOWLER has been refused by letter to movant which is filed herewith.

1. Movant is a member of the Bar Association of the State of Connecticut and a practicing criminal law attorney in that state which has a recently enacted statute providing for the penalty of death (Conn. Gen. Statutes 53a-46). Movant has a legal duty to promote justice and improve the legal system as well as to protect and defend the Constitution of the United States. The issues in this case being of such compelling public interest, the movant seeks to execute said duty by functioning as friend of the Court.

2. Movant will brief the following issues:

a) Whether any argument that a death penalty is unconstitutional per se can be reconciled with the several references in the Federal Constitution which seem to imply that such penalty is valid and allowable?

b) Whether a death penalty imposed by a state law which may comply with the decision in Furman vs. Georgia, 408 U. S. 238 (1971) is nonetheless violative of the rights of the people under the 8th and 14th Amendments to the Federal Constitution in spite of any evolving social standards of decency in that such penalty does not fit the constitutionally proper definition of legal punishment implicit in the 8th Amendment, and in that it amounts to a bare, non-corrective forfeiture and as such outside the due process of law mandate, any deterrent effect thereof being only an incidental objective of the law?

c) Whether such penalty violates any fundamental rights retained by the people via the 9th Amendment to the Constitution and whether this Court should consider such issue which may not be presently before the Court on this appeal?

3. Movant expects to be able to assist the Court by presenting written, but not oral unless the Court so directs, arguments and viewpoints on the issues which the parties will not present or adequately present and on questions of law as outlined in paragraph 2 herein which the parties will not present or adequately present as far as movant can discern from communications with them and from reviewing all arguments of Petitioner's counsel of record as set out in the petition for writ of certiorari in DILLARD vs. NORTH CAROLINA, No. 73-6875, petitioner's counsel having informed movant that such arguments are to comprise the major argument thrust in the instant case.

4. The relevancy to the disposition of the case of movant's arguments and proposed questions of law lies in the fact that they pertain to the basic issue of whether any state government can ever constitutionally impose a penalty of death for a crime.

5. Movant expects that his assistance to the Court will be helpful especially in light of the compelling public interest in the outcome of this case.

For the foregoing reason this motion for leave to file brief as amicus curiae should be granted.

Dated November 8, 1974

Richard A. Heim
Counselor at Law
53 Windsor Avenue
Vernon, Connecticut

Supreme Court, U. S.
FILED
DEC 16 1974
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-7031

JESSE THURMAN FOWLER,
Petitioner

vs.

STATE OF NORTH CAROLINA,
Respondent

BRIEF AMICUS CURIAE

Amicus Curiae Pro Se
Richard A. Heim
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Vernon, Connecticut

Filed pursuant to order
of the Court dated
November 25, 1974.

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P. O. Box 629
Raleigh, N.C.

INTEREST OF AMICUS CURIAE

Amicus curiae is a member of the Bar Association of the State of Connecticut and a practicing criminal law attorney in that state which has a recently enacted statute providing for the penalty of death (Conn. Gen. Statutes 53a-46). Amicus has a legal duty to promote justice and improve the legal system as well as to protect and defend the Constitution of the United States. The issues in this case being of such compelling public interest, Amicus seeks to execute said duty by functioning as friend of the Court.

ARGUMENT

I. DOES A DEATH PENALTY VIOLATE THE 8TH AND 14TH AMENDMENTS IN AND OF THEMSELVES AND WHEN CONSTRUED WITH CERTAIN RIGHTS RETAINED BY THE PEOPLE VIA THE 9TH AMENDMENT?

The preservation and furtherance of the welfare of the people is the aim of our Constitution, its sole purpose being to protect and improve the system in which those people are free to exercise their basic and fundamental rights to live, to have liberty, and to pursue happiness. All laws made to establish, maintain, and improve order and justice must embrace that sole purpose and no other. Justice is a consideration which our Constitution sets out in its very preamble. The right to life and to receive the benefit of the laws are the most basic and fundamental of the people. That every American has such rights is grounded in the very public policy of those people as expressed in our Declaration of Independence which declares that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

A law which allows for the execution of a hunan being for a crime violates the 8th and 14th Amendments because such measure goes beyond punishment within the legally proper meaning of that word implied therein as well as in the spirit of the entire Constitution. A penalty can be classified as not cruel and unusual and still violate the constitutional standard for the concept of punishment if its objectives are improper.

By the same token a penalty can be most cruel and unusual but still amount to punishment if the aims are proper. Imposition of a death penalty is merely a forfeiture of one's existence but it is not punishment. This Court has recognized six possible purposes behind any criminal penalty, those being correction, isolation, deterrence, retribution, eugenics and the economy. Of these considerations, only two are constitutionally valid as will be argued below. And if a particular penalty does not further one or both of these aims, it is not punishment in the constitutional sense. In the case of a penalty of death, if such aims are not met, the result is not only a violation of the 8th and 14th Amendment concepts of punishment, but also an infringement of the 9th Amendment fundamental rights to be corrected as a protection of the law and to have life itself.

The only constitutionally acceptable definition of punishment for crime is that which aims at individual correction and temporary protective isolation. Execution accomplishes no correction. It is purely an extermination. It amounts to a legislative mandate that certain criminals are beyond help and cannot and shall not be rehabilitated. Punishments cannot consist of measures which simply isolate or destroy persons dangerous to society for in one case the result is an aimless perpetual burden on the public revenue, and in the other a violation of the rights to live and to receive the law's help and protection through corrective procedures. Simple isolation or extermination are wasteful, non-constructive approaches and penalties must go farther than that. They must seek to correct those with propensities for wrongful conduct and this consideration must fall under the basic notion that all men are entitled to the protection of the law, equal protection aside. Can it not be said that the death penalty is equal to no protection at all? Is it not rightfully stated that such penalty falls outside the limits of the implied meaning of the word punishment in the 8th Amendment because that measure is excessive and disproportionate to any crime, and that it affords those executed no protection of the law whatsoever? Aside from the 9th Amendment rights to marital privacy or freedom of interstate travel, does it not seem elementary that the same amendment guarantees two much more basic rights to every American, those being the rights to be helped by the law in-

stead of erased from existence or totally ignored, and to simply stay alive? What is it about a penalty that makes it disproportionate or excessive? More stringent than needed for correction? It cannot mean more isolative than is necessary since no criminal should be returned to society while still possessing wrongful tendencies. It also cannot mean more vengeful or more of a deterrent example than is needed since those purposes are constitutionally improper as will be argued below. Considerations of eugenics and the economy are likewise improperly met by a death penalty.

That execution serves to remove the most dangerous criminals from the public and thereby promotes the general welfare and safety cannot be denied. But incarceration achieves a like result and hence renders the death penalty a measure which goes too far as well as one which ignores correction.

The penalty of death does satisfy the public desire for vengeance, but is that a valid object of any law? Are the tax revenues of the people to be used to carry out vengeance? Clearly this is not promotive of any legitimate governmental purpose. Such purpose must aim solely at improving public welfare and safety in a constructive manner and when applied to criminal penalties, includes protective isolation and restorative correction but certainly not retaliation.

It cannot be denied that the death penalty might act as a deterrent example for others to heed and therefore promotive of the general welfare. But is this a legally acceptable objective? Laws are made to preserve order and protect individual rights and everyone subject to those laws knows or is presumed to know of the standard of conduct required of them pursuant thereto and that any conduct outside that standard will not be tolerated by society and that steps will be taken to insure that behavior not meeting that standard will be made to conform in the future. The people are under a duty to obey the law out of respect for what it stands for and tries to accomplish, but not out of fear of reprisal. Deterrence is an incidental object of a penalty at best. While it may serve to show the public that wrongful conduct is dealt with in some fashion, this is nothing more than an exhibition of the workings of the legal process. But to impose a penalty with a primary objective of making others obey the law is an improper

use of that penalty. Making certain that a particular defendant will not break this particular law in the future is the only proper objective except for public protection during the corrective period. The reason behind this proposition is in the fact that our Constitution forbids governmental taking of private property for public use without just compensation. Can it then be argued that the same document allows taking of life as a penalty for crime in furtherance of deterring others from the same crime? Is this not a taking for a public purpose of something far more sacred than property without any compensation at all? I urge the Court that it is and as such violative of the 9th Amendment right to life, to be helped by the law, and the permissible standard for the concept of punishment implied in the 8th Amendment.

While it might be true that human eugenics are improved by extermination of those who could pass on criminal tendencies to their offspring, sterilization does the job just as well and therefore leads to the conclusion that a penalty of death meets this objective in an excessive way.

Economic considerations are furthered if some criminals are put to death since the public no longer has to support the wrongdoer or suffer from his misdeeds. But if he is properly corrected, there will be no more misdeeds. Public support of such criminal during the corrective period does take away funds which might be used for other purposes, but there is no alternative when the basic rights to live and not to be shunned or left without the protection and help of the law are brought into view. Even if some criminals absolutely cannot be corrected, the right to remain as a living human being, albeit permanently incarcerated, demands that the public revenues be used for that purpose.

Finally, that the Court should consider constitutional issues not raised below or presented on appeal by the parties can be supported by the fact that it has the power to note a plain error not assigned and that protection from governmental invasion of the rights of the people should not be made to depend solely on the skill of their counsel. This Court must be the final overseer thereof.

II. CAN ARGUMENTS THAT A DEATH PENALTY IS UNCONSTITUTIONAL PER SE BE RECONCILED WITH THE SEVERAL REFERENCES IN THE CONSTITUTION WHICH SEEM TO IMPLY THAT IT IS VALID AND ALLOWABLE?

The 5th Amendment provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. To impose a literal meaning to "life or limb" would foreclose application of this guarantee to crimes punishable only by monetary fine. Clearly that is not the case because the guarantee applies to all crimes. Hence, the meaning of "life or limb" is figurative. It means interruption of one's life activities or life routine as a free citizen through incarceration and it means interruption of one's free use of property as in the taking of money in the form of a fine.

The 5th Amendment also contains the phrase "Capital, or otherwise infamous crime," the common definition of the word capital being "punishable by death." But does the use of this word sanction the imposition of death as a penalty? Hopefully it does not. The choice of the word capital was made simply to denote those types of crime which had traditionally been met with penalties of death in the past along with types considered "otherwise infamous." It was not used to imply that such penalty was in keeping with the fundamental rights of every American to life, to the aid and protection of the law, and to receive measures which constitute lawful punishments when criminally astray.

The 14th Amendment forbids any state from depriving any person of life without due process of law. It does not, nor does any other part of the Constitution, say that this is but one way of depriving a person of life. Rather, it commands that due process of law is the only way through which a state may so act. Is the imposition of a death penalty a due process of law deprivation if it follows a fair judicial proceeding? Taking liberty for a proper time or taking property (monetary fine) after a fair judicial proceeding would meet the due process mandate since, in addition to all else, these measures aim at correction and public protection (during incarceration). Such objectives make the deprivations due process ones. But taking of life as a criminal penalty does not correct the executed felon and goes overboard in public protection. Since no other legitimate objective exists, the death penalty amounts to a deprivation of life without due process of law. Examples of taking of life with due process will be given below. If we recognize that cruel and unusual punishments are prohibited to the states because they do not meet the due process concept of the 14th Amendment, can it not be rightfully argued that due process also requires that penalties for crime have objectives which are constructive and do not violate any other fundamental right retained by the people? Are not such objectives to be limited to individual correction and protective isolation, and are not any other purposes excessive, outside the declared public policy of the American people, contrary to the basic notions of fairness and human dignity, and violative of 9th Amendment rights?

What then are due process of law deprivations of life? Any that are necessary to prevent the loss of the right to life in others who are in immediate danger of such loss. Thus, the governmental slaying of one who criminally threatens instant grave or mortal harm upon another would be a due process of law deprivation. State legislative sanctioning of the abortion of a fetus of any age which medically imperils the life of the mother would be another example if that fetus were capable of sustaining life on its own, although this Court has ruled that such fetus is not a "person" under the 14th Amendment. It is only in these limited types of situations that human beings forfeit their rights to receive the law's protection and help and to life itself. And to those who would argue that such deprivations of life are merely police power exercises furthering public welfare and safety, it need only be pointed out that the Constitution forbids police power taking of life if that power is being exercised outside the due process of law limitation thereon. Hence, any state deprivation of life must be in keeping with the 14th Amendment mandate. The two cited examples do amount to due process takings because of the purpose behind each. But killing a person for a past criminal act which harmed the public is quite another thing.

Due process of law demands not only fair judicial proceedings and punishments which are not cruel and unusual,

but also proper and legitimate objectives of the process itself and if public protection and criminal correction are not the limit of those objectives, then the takings are not with the due process of law. Such things as loss of voting rights forever, or loss of liberty forever, or loss of life as a penalty for crime are not constructive, not corrective, not rehabilitory, not due process deprivations.

As a final observation, it should be pointed out that many states which have laws allowing for the death penalty delegate the duty of execution to the state department of corrections. Perhaps the name for such departments should be changed.

CONCLUSION

Amicus curiae respectfully urges the Court to find and declare that no state may impose a penalty of death for a crime under any circumstances because such penalty is repugnant to the rights of the people under the 8th, 14th, and 9th Amendments to the Constitution of the United States.

Dated December 3, 1974

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Supreme Court, U. S.
FILED
FEB 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

vs.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

Brief of Amicus Curiae in Support of Respondent

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IN THE

Supreme Court of the United States

October Term, 1974
No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

vs.

NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

Brief of Amicus Curiae in Support of Respondent

Interest of Amicus Curiae

The State of California files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of California have a vital interest in the question presented on the grant of certiorari in this case, that is, whether the imposition and carrying out of the sentence of death for the crime of murder under the law of North Carolina violates the Eighth or Fourteenth Amendments to the Constitution of the United States. (Petition for Certiorari, p. 2.)

For the reasons set forth below the State of California will be affected by the ultimate disposition of the question presented for review before this Honorable Court in the above entitled matter.

The attention of amicus will be directed to the fundamental issue: Is capital punishment cruel and unusual within the meaning of the Eighth and Fourteenth Amendments to the United States Constitution?

When this issue was last before this Honorable Court, the State of California was one of the parties appearing. *Aikens v. California,* No. 68-5027, reported in 403 U.S. 952, 91 S.Ct. 2280. The order granting certiorari in *Aikens* was made on June 28, 1971, and the question was stated, "does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." On the same date, similar orders were made in *Furman v. Georgia,* 403 U.S. 952, 91 S.Ct. 2282; *Jackson v. Georgia,* 403 U.S. 952, 91 S.Ct. 2287; and *Branch v. Texas,* 403 U.S. 952, 91 S.Ct. 2287. In the *Aikens* case, in contrast to the other three cases, at the guilt and penalty phases in the California court, three brutal murders were proved and, in the brief for the petitioner Aikens, it was conceded "we make no claim that if the death penalty can constitutionally be inflicted for any such crime, it cannot be inflicted on this petitioner." Petitioner's Brief, *Aikens v. California,* p. 5.

Prior to the date set for argument before this Honorable Court, in the *Aikens* and related cases, the California Supreme Court set for argument the case of *People v. Anderson* (Crim. No. 13617), which was ultimately reported in 6 Cal.3d 628 [498 P.2d 880] (1972). In the *Anderson* case, the California Supreme Court, on February 18, 1972, held that capital punishment was unconstitutional under Article I, section 6 of the state constitution in that it came within the proscription of the cruel *or* unusual punishment clause thereof, finding that it was cruel and also unusual.[1]

Although the *Aikens* matter was argued on January 17, 1972, along with *Furman, Jackson* and *Branch, supra,* when the *Anderson* case was decided on February 18, 1972, the suggestion was made to this Honorable Court that the *Anderson* decision mooted the issue involved in *Aikens* and that as a consequence the petition should be dismissed. Accordingly, on June 7, 1972, this Honorable Court in *Aikens v. California,* 406 U.S. 813, 814, determined, on the Suggestion of Mootness and Motion for Remand, the decision of the state court having rested on an adequate state ground and the holding having been determined by the California court to be fully retroactive and applying to any prisoner in the State of California under sentence of death, that the petitioner Aikens no longer faced a realistic threat of execution and that the issue upon which certiorari was granted was now moot. Accordingly, the writ of certiorari was dismissed.

On June 29, 1972, this Honorable Court rendered the decision in *Furman v. Georgia* reported in 408 U.S. 238, holding that in *those* cases (*Furman, Jackson* and *Branch*) the imposition and carrying out of the death sentence was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Thereafter, through exercise by the People of the initiative, the Constitution of the State of California was amended, effective on November 7, 1972, providing as set forth in Article I, section 27, that the death penalty provided in the State statutes should not be

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[1]*Cf., In re Anderson,* 69 Cal.2d 613, 629-32 [447 P.2d 880] (1972).

deemed to be infliction of cruel or unusual punishments within the meaning of Article I, section 6, or any other provision of the state constitution. The amendment to the state constitution is attached to this brief and marked Appendix A.

Following the amendment of the state constitution and the ruling of this Honorable Court in *Furman v. Georgia, supra,* the Legislature of the State of California, by Senate Bill 450, which subsequently became Chapter 719 of the Statutes of 1973, enacted statutory provisions to reinstate the death penalty in certain circumstances. Chapter 719 became effective January 1, 1974, and is attached to this brief and marked Appendix B.

It is evident that the People, by the exercise of the initiative, indicated what had previously been clear in the state constitution[2] that capital punishment was not to be prohibited as an available punishment for serious crimes and that abolition should be effected by the constitutional mode thereof by the vote of the representatives of the People through their Legislature and not locked into the constitution forever by judicial edict.

Amicus contends that the prohibition of the Eighth Amendment to the Federal Constitution against cruel and unusual punishment should not be construed as a bar to the states or to the Congress to provide as a punishment for serious crimes the death penalty and that the imposition of such punishment for such serious crimes is not prohibited by the Federal Constitution.

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[2]Article I, sections 6, 8 and 13 as the article then read. Article VI, section 11 gives the State Supreme Court direct appellate jurisdiction in *capital* cases.

Amicus is concerned that petitioner herein seeks to importune this Honorable Court to "lock into" the United States Constitution the abolition of capital punishment and to place beyond the power of Congress and the People, through the legislatures of the several states, the right to determine that the protection of society from serious crimes requires the availability of this sanction, a dilemma which only recently confronted the People of the State of California.

The State of California has been authorized by the Attorney General of Oklahoma, the Honorable Larry Derryberry, to inform the Court that the State of Oklahoma joins in this amicus brief and in urging that the provisions of the United States Constitution do not prohibit capital punishment as a penal sanction for serious crimes.

The State of California is also authorized to state that the State of Texas, by the Honorable John L. Hill, Attorney General, supports amicus in its basic position that it is constitutionally permissible for state legislatures to provide for the death penalty for certain crimes.

Summary of Argument

Capital punishment has been recognized as a permissible punishment for serious crimes since the establishment of our nation. It was expressly referred to in the Fifth Amendment, adopted at the same time as the Eighth. The wisdom and social desirability of this penal sanction are matters addressed to the legislative branch of government.

This Court has not declared the death penalty to be unconstitutional *per se* and in decisions in which other forms of punishment were held cruel and unusual,

i.e., Weems v. United States, 217 U.S. 349; *Trop v. Dulles,* 356 U.S. 86, and *Robinson v. California,* 370 U.S. 660, it was assumed or expressly stated that the death penalty did not violate the Constitution. *Furman v. Georgia, supra,* did not reverse this line of authority.

The intent of the Framers was to bar only those punishments both cruel and unusual either in their inherent form or as grossly excessive in their application in relation to the seriousness of the particular crime.

The arguments of petitioner that capital punishment serves no social purpose and his claim that there are alternative penal sanctions should be directed to Congress and the legislatures of the several states and do not raise a constitutional question. No burden is placed on the People or the states to present conclusive proof of the utility of this form of punishment and any burden, if one exists, is only to demonstrate that there is in fact a basis upon which Congress and the state legislatures could reasonably conclude that certain serious offenses should be punished by death.

The studies upon which petitioner relies for his conclusion that capital punishment serves no penal purpose have obvious flaws and there are numerous graphic illustrations of the deterrent effect of this sanction as well as proof of the inadequacy of incapacitation by life imprisonment as a protection for society. The deterrent force of the threat of the death penalty has been recognized by this Court and those who come into direct contact with the criminal offender.

It must be concluded that petitioner has failed to make a case for his contention that no legitimate social aim can be furthered by the availability of this form of punishment.

Petitioner's claim that this form of punishment has been rejected by society is refuted by the evidence he presents. The claim is also refuted by the response at the ballot box and in the legislative halls of a majority of the states. The recent enactments by Congress and the majority of the states of legislation providing for capital punishment is indicative of the continuing recognition of the need for this penalty as a protection for society.

Amicus submits that nothing has happened in the 185-year history of the Constitution which requires this Court to now declare the punishment, expressly recognized in our Constitution and upheld by a line of decisions spanning a good part of our nation's existence, to be in violation of the Eighth Amendment.

It must be concluded that this accepted form of punishment is not "cruel and unusual" in violation of the Eighth Amendment.

ARGUMENT

Capital Punishment Is a Form of Punishment Expressly Recognized by Provisions of the United States Constitution and by a Line of Court Decisions Spanning Over 180 Years and Petitioner Has Presented No Constitutional Basis for His Claim That It Now Should Be Declared to Be Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments

A. Introduction

Amicus will direct the argument to the contention that the infliction of the punishment of death is excessive (Br. for Pet., pp. 102-40), and in violation of the prohibition of cruel and unusual punishments contained in the Eighth Amendment to the United States Constitution.

If the questions relating to the North Carolina procedure as to the charging function of the prosecutor (Br. for Pet., pp. 45-53), the disposition of cases before trial (Br. for Pet., pp. 53-61), the fact finding function of the jury under the guarantee of the Sixth Amendment (Br. for Pet., pp. 62-95), and the exercise of the clemency function of the executive (Br. for Pet., pp. 95-101) are before the Court on the grant of certiorari in this case, amicus will leave these matters to the respondent for reply.

It is submitted that *Furman* struck down the imposition and carrying out of discretionary death sentences and that it did not discuss other functions of the criminal justice system (referred to by petitioner as "these mechanisms" (Br. for Pet., p. 102)). The prosecutor is a public officer charged with duties and obligations as a member of a coordinate branch of government.

He can take into account special facts and circumstances of the particular case not taken into account by rigid rules. Traditionally this function has not been disturbed except where the exercise thereof has been based on a suspect or unjustifiable standard, such as race, religion, or other arbitrary classifications. *See Oyler v. Boles*, 368 U.S. 448; *Newman v. United States*, 382 F.2d 479, 480. This rule would also be applicable to pleas and other dispositions in the individual cases. *Furman* likewise was not directed at the fact finding function of juries and this was not the "discretion" of which the Court spoke; nor was the clemency power of the executive impugned.

Petitioner has not shown any reason why these vital functions in the system of justice, and to which *Furman* was not directed, should be treated differently when a death penalty is possible. It is submitted that in arguing such a departure from customary procedure in the federal and state systems of criminal justice petitioner reads too much into *Furman*. *See State v. Jarrette*, 284 N.C. 625, 202 S.E.2d 721, 741-43.

B. The Constitution and the Decisions of This Court Set the Standard of Review on the Issue of Constitutionality of the Death Penalty

Under the caption "The Standard of Judicial Review" petitioner (pp. 103-21) attempts to have this Honorable Court ignore the clear mandate in the Constitution, the amendments thereto and the decisions of this Court in numerous cases throughout our history and to hold that now, because of some magic talisman called "evolving standards", the death penalty is forbidden to Congress and the various states by the Eighth Amendment.

It is the contention of amicus that the United States Constitution does not forbid the Congress and the various states from providing such a sanction in performing the function of affording protection to the law abiding citizens.

It is, of course, a tempting invitation to enact one's personal predelictions into the constitution. It is acknowledged that this puts judicial restraint to a severe test.

The petitioner speaks as though the recognition of the retention of the power of the People to abolish or retain capital punishment relegates the power in the court under the Eighth Amendment to "mere advice." His complaint is that to acknowledge that the court lacks power to legislate the abolition of capital punishment makes the Eighth Amendment a nullity. This argument is made without regard for the proper exercise of that power by this Court in reversing convictions in *Weems, supra; Trop, supra;* and *Robinson v. California, supra*. In *Weems*, the reversal of the judgment was on the basis of cruelty inherent in the punishment. In *Trop* and *Robinson*, it was the disproportionate penalties involved that required the reversal.

See Granucci, "Nor Cruel and Unusual Punishment Inflicted the Original Meaning" 7 Calif. L.Rev. 839.

The Court has not considered itself foreclosed from considering whether in a particular case the Eighth and Fourteenth Amendments have been offended. However, the Court has not considered itself free to read into a portion of the constitution a meaning that is plainly at variance with its language.

Amicus contends that the Constitution does not permit "evolving standards" to be the basis for taking

away those rights retained by the states and the People and expressly permitted forms of punishment contemplated as constitutional, without complying with the provisions of that document for the orderly and lawful amendment thereof. U.S. Const. Art. V.

In response to the argument that the scope of judicial review must include the power to declare the abolition of capital punishment, amicus contends that the clear intent of the Framers of the Constitution and its amendments was to bar only those punishments which are both cruel and unusual either in their inherent form or grossly excessive in their application in relation to the seriousness of a particular criminal act.

It cannot be said that a constitutional issue is presented to this Court by petitioner's claim that alternative remedies are available to the states and Congress. Most of petitoner's arguments should properly be directed to Congress and to the various state legislatures. Petitioner has a burden, that he has not met, to demonstrate that the legislative bodies charged with the difficult task of fashioning punishment for serious crimes could not determine that capital punishment is a necessary weapon in the arsenal of society to combat serious and violent crime.

As Mr. Justice Harlan stated in *McGautha v. California*, 402 U.S. 183, 195-96, the court's "function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures . . . in such cases." The question for decision is not whether the Court approves the procedures followed, the question is whether those procedures fall below the minimum level the Constitution would tolerate.

The judgment as to the feasibility of capital punishment is one that the Constitution delegates to the Legislature. The Eighth Amendment has not in the past, nor does it now, forbid to the Congress or the legislatures of the several states the power to determine that capital punishment can serve a proper penal purpose in the structure and framework of the criminal justice system.

Chief Justice Burger, dissenting in *Furman, supra* at 384, set the proper standard for judicial review of this matter,

> "I do not suggest that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment, but, rather, that the primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not provable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in society. This presumption can only be negated by unambiguous and compelling evidence of legislative default."

Such evidence has not been forthcoming!

There is no issue before this Court of the wisdom or social desirability of capital punishment. These are questions addressed wholly to legislators. Even those who are personally opposed to capital punishment may well conclude that it violates no provision of the Constitution. The petitioner strives to wrest from the Constitution the power in the court to now declare that what was accepted as a mode of punishment for crime from the time of the inception of the nation is no longer to be tolerated by the Constitution. This is a task

of some magnitude in light of the authorities which will be reviewed.

C. Capital Punishment Is Recognized in the Constitution as a Form of Punishment Available to the People

The history of capital punishment in this country and the deep rooted origins of that form of punishment in the religious and moral heritage of contemporary America provide clear indications that the death penalty is no barbaric relic of the past.

Execution as a form of punishment is expressly recognized by provisions of the United States Constitution. The Constitution as originally written, contained indirect allusions to capital punishment. Among the Constitution's objectives as set forth in the preamble were to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." Further evidence of the Framers' intentions is contained in Article II, section 2, giving the President power to grant reprieves (withdrawal of sentence of death) and Article III, section 3, providing that Congress shall have power to declare the punishment for treason, the common punishment then, and now in jurisdictions retaining capital punishment, being death. The specifications of these objectives suggest that the Framers intended the new federal government to have the inherent power of all governments to decree whatever customary punishments for criminal conduct were deemed necessary to protect the lives, liberties and properties of its citizens. *See In re Kemmler*, 136 U.S. 436 at 449. Absent particular prohibitions written into the Constitution, this was to be the rule. Similarly, three years later, the Tenth Amendment recognized that pow-

ers not prohibited to the states or delegated to the federal government were reserved to the respective states or to the People.

The history of the phrase "cruel and unusual punishment" and its inclusion in the first ten amendments to the United States Constitution has been treated at length in recent opinions of this Honorable Court and in some exhaustive commentaries by scholars. One fact stands out clear and was well stated by Mr. Justice Black, concurring in *McGautha v. California, supra,* 402 U.S. 183 at 226, the Eighth Amendment's "words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable . . . that the framers intended to end capital punishment by the Amendment."

The first ten Amendments to the Constitution were proposed by the First Congress and in turn ratified by the States in 1791. Among these, the Fifth Amendment expressly recognized what had been implied in the provisions of the original Constitution, that death was among the forms of punishment for criminal conduct available to the federal government. The Fifth Amendment contains a mandate that "No person shall be held to answer for a *capital,* or otherwise infamous crime, unless on a presentment or indictment of the grand jury." The amendment further commands that no person "be twice put in jeopardy of *life*", nor deprived of *life,* liberty, or property, without due process of law. This language was included and made applicable to the states in 1868 by the Fourteenth Amendment.

The following chronology further refutes the contention that those who enacted the Eighth Amendment

intended thereby to abolish capital punishment. The amendment passed the First Congress on September 25, 1789. That same Congress, a mere seven months later enacted "An Act for the Punishment of Certain Crimes Against the United States", which statute made the following offenses punishable by death by hanging: treason, murder within federal territory, piracy, and counterfeiting of public securities. *See* Act of April 30, 1790, ch. 9, §§ 1, 3, 8, 14, 33, 1 Stat. 112. The Eighth Amendment was ratified by the states on December 15, 1791, and less than four months later on April 2, 1792, the Second Congress made it a capital offense to debase coins of the United States Mint. Act of April 2, 1792, ch. 16, § 19, 1 Stat. 246.

As will be developed hereafter, the interpretation of the clause by this Court[3] confirms the conclusion that capital punishment was not prohibited to the federal government or the states by the Eighth Amendment.

D. This Court Has Recognized the Constitutionality of Capital Punishment for Over 180 Years

The subsequent history of the Eighth Amendment as it has been interpreted by this Court in 184 years of its existence likewise lends no support to the claim of petitioner that the death penalty is unconstitutional when carried out without unnecessary cruelty as punishment for a serious offense such as murder.

The first occasion this Honorable Court had to consider at any length the constitutional prohibition against cruel and unusual punishment was in 1878 in the

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[3]When *Furman* was before this Court, the constitutions of 48 states contained some provision against excessive punishment but, with the California experience excepted, no state court had interpreted these provisions as abolishing capital punishment.

case of *Wilkerson v. Utah*, 99 U.S. 130. In that case the Court upheld the mode of execution, shooting, as not forbidden by the Constitution's prohibition against cruel and unusual punishment. This Court noted the difficulty in defining "the extent of the constitutional provision" but the applicability of the provision to punishments of torture and all others involving unnecessary cruelty.

In 1890, the Court denied an application for writ of habeas corpus sought on an allegation that death by electrocution constituted a cruel and unusual punishment. *In re Kemmler*, 136 U.S. 436. This Honorable Court denied the application on the grounds that the Eighth Amendment did not apply to state legislation, but added the comment:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, *something more than the mere extinguishment of life*." (Emphasis added.)

In *Weems v. United States, supra*, 217 U.S. 349, this Honorable Court in 1910, for the first time, overturned a punishment as cruel and unusual. In that case the defendant, on conviction of falsifying an official document, had been sentenced to 15 years of hard labor to be served in wrist and ankle chains with attendant life-long disabilities and a severe fine. The case arose under the Philippine Bill of Rights, whose prohibition against "infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning." (*Id.* at p. 367).

This Court was not troubled by the circumstance that the punishment was somewhat novel in the context of the type of punishment to which the cruel and unusual clause was thought to apply noting that the clause, like all principles "to be vital must be capable of wider application than the mischief which gave it birth." Quoting from Cooley's Constitution Limitations, the Court stated that it was probable that "any punishment declared by statute for an offense which was punishable the same way at common law could not be regarded as cruel or unusual, in a constitutional sense."

In setting aside the punishment, this Court in *Weems* noted that "there are degrees of homicide that are not punished so severely" and that the statute in question had no parallel in American legislation and came from a government of different origins. The Court found the statute "cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind." (*Id.* at p. 377).

In 1947, the case of *Francis v. Resweber*, 329 U.S. 459, was considered by the Court. In this case the issue was whether a pending second electrocution of a condemned murderer following an unsuccessful first attempt at execution constituted cruel and unusual punishment. The Court rejected the claim of unconstitutional punishment. In an opinion joined by three other members of the Court, Mr. Justice Reed, in announcing the judgment of the Court, discussed the issue under the assumption, but not so deciding, that a violation of the Eighth Amendment would be violative of the

Fourteenth Amendment's due process clause. The opinion concluded:

> "We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.
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> ". . . . The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, *not the necessary suffering involved in any method employed to extinguish life humanly.*" (*Id.* at pp. 463-64; emphasis added).

The next occasion on which this Court examined the scope of the Eighth Amendment's prohibition against cruel and unusual punishment was in 1958 in the case of *Trop v. Dulles, supra,* 356 U.S. 86, in which Chief Justice Warren, joined by three other members of the Court, concluded that denationalization of a native-born citizen for less than one day's desertion from military duty constituted unconstitutional punishment. Justice Brennan found the enactment of such punishment beyond the power of Congress to legislate. Four justices rejected both theories and would have upheld the statute upon which the denationalization was premised.

Chief Justice Warren's opinion noted that initially, "since wartime desertion is punishable by death, there

can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." While recognizing the phrase cruel and unusual punishment was not precise, the opinion clarified the scope of the constitutional prohibition against such punishment by stating, "Fines, imprisonment and *even execution* may be imposed depending upon the enormity of the crime but any technique outside the bounds of these traditional penalties is constitutionally suspect." (Emphasis added). Thus the penalty in *Weems* was characterized as meeting the two-prong test of being cruel in its excessiveness and unusual in its character, as was the penalty in the case then before the Court. Stating that the Eighth Amendment must "draw its meaning from its evolving standards of decency that mark the progress of a maturing society", Chief Justice Warren concluded that denationalization under the circumstances before the Court constituted "a form of punishment more primitive than torture." Significantly, Chief Justice Warren stated:

> "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be on capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concepts of cruelty." *Trop v. Dulles, supra* at 99.

Thus the opinion of the Court, while recognizing the forceful legislative arguments against the death penalty, rejected the constitutional argument against that form of punishment.

Any doubt whether the Eighth Amendment's ban on cruel and unusual punishment applied to the states through the operation of the Fourteenth Amendment was dispelled in 1962 by the decision of this Court in *Robinson v. California*, 370 U.S. 660, which invalidated punishment of imprisonment imposed on the defendant by reason of his being found addicted to narcotics. In this case the Court's opinion focused not on the nature of the punishment, which was only 90 days in county jail, but on its inappropriateness as applied to a status, that of being a narcotic addict.

In 1968, this Honorable Court refused to extend its ruling in *Robinson* to the punishment, by a fine of $50, of a defendant convicted of the crime of being intoxicated in a public place, *Powell v. Texas*, 392 U.S. 514. In this case the plurality opinion of the Court distinguished the punishment of status involved in *Robinson* from the punishment of the uncompelled act before the Court in *Powell*.

If the decisions of this Court applying the cruel and unusual punishment clause are susceptible of synthesization into a consistent body of principles, the cases appear to stand for the following propositions, punishment will be held unconstitutional if it is both cruel and unusual either as (1) a punishment inherently cruel and inherently unusual in its form or (2) a punishment not inherently cruel and unusual but grossly excessive as applied (a) in relation to the seriousness of the particular criminal act or (b) to any status which does not involve an uncompelled act.

Seizing upon some of the language of the plurality opinion in *Trop v. Dulles, supra*, 356 U.S. 86, as proof that that decision signaled the end of the right of both the Congress and the legislatures of the various states

to prescribe death as a punishment for first degree murder, the petitioner ignores the fact that the opinion in question went out of its way to recognize the Constitutional validity of the death penalty. The words that the petitioner uses are "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles, supra* at 101. To be fair to petitioner, his fixation with this phrase is understandable in view of the fact that it provides the only arguable escape from the historical reality of capital punishment's recognition as a legitimate penalty, outside the scope of cruel and unusual punishments, in the wording of the Constitution and in the law that preceded and followed adoption of that document and the Bill of Rights.

In petitioner's attempt to avoid the impact of this history, he has failed to demonstrate that anything has transpired in the last 17 years since 1958 that has impugned the validity of the observation made by Chief Justice Warren that the death penalty "in a day when it is still widely accepted cannot be said to violate the constitutional concept of cruelty." *Trop v. Dulles, supra*, 356 U.S. 86 at 99.

Amicus contends that *Furman* did not overrule the cases discussed hereinabove or impugn their validity as proper interpretations of the Eighth Amendment to our Constitution. Further, that the short time since *Trop* was decided has not seen any retreat from the wide acceptance of capital punishment recognized as foreclosing any constitutional rejection of capital punishment.

Amicus adopts the analysis of the Chief Justice in his dissenting opinion in *Furman v. Georgia, supra*, at 375-76, 396-403, that the Court did not rule capital

punishment *per se* violative of the Eighth Amendment, but that the judgments in the cases before the Court were to be set aside because of discretionary sentencing practices; that the Eighth Amendment could not be construed to be a bar to the imposition of the sentence of death but that juries and judges were not to be permitted to make the sentencing determination in the same manner as they had in the past.

See also Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia" 25 Stan. L. Rev. 62; "You May Kill, But You Must Promise Not to Use Discretion: Furman v. Georgia" 6 Loyola L. Rev. 526 (1973).

E. Congress and the Legislatures of the Various States Can Reasonably Determine That the Protection of Society Under Present Conditions Requires Death as a Form of Punishment for Certain Serious Offenses

The amicus contends that the death penalty does serve a vital purpose in the punishment structure of society and that this is a matter upon which the legislatures of the various states and the Congress may make a determination.

Amicus does not concede that it has the burden of proving that the death penalty is a superior deterrent by making this argument, nor that capital punishment must be established as a more effective punishment for crime in order that this penalty be constitutionally acceptable. It was not the intention of the Framers of the Constitution to require such a showing by Congress or the states.

The showing as to the social utility of capital punishment should be addressed to the legislative body and the burden, if any, which must be assumed in the judi-

cial setting, is only to demonstrate that there is, in fact, a basis upon which the legislatures of the various states and Congress could reasonably conclude that certain serious offenses should be punished by death.

It is a settled doctrine of constitutional law that the burden of proof is on the one who challenges the constitutionality of a statute and that in the absence of a clear showing of unconstitutionality a state statute will be presumed valid. *McGowan v. Maryland,* 366 U.S. 420, 425-26.

Many of the arguments made by the petitioner are moral, humanitarian, and pragmatic arguments against capital punishment which might well prove persuasive to the Legislature in considering a change in the law or to a governor asked to commute a sentence of a condemned person, but, in this Court, the argument must stand or fall on its own since this Court is limited to the issue of constitutionality and it cannot write into the law its notion of morality or humanitarianism or its pragmatic preferences.

As a purely constitutional matter, the analysis made by petitioner gives too little weight to the elements of retribution and deterrence and gives too much weight to "advance concepts of behavioral science." It is submitted that the constitution does not require legislatures to reflect sociological insight or shifting social standards any more than it requires them to keep abreast of the latest scientific standards.

See Goesaert v. Cleary, 335 U.S. 464, 466; *see also, McGautha v. California, supra,* 402 U.S. 183, 221.

The basic elements commonly ascribed as the purposes of punishment may be reduced to four: (1) deterrence; (2) incapacitation or isolation; (3) rehabilitation; and (4) retribution. As to rehabilitation, it is ob-

vious that as to the serious criminal offender deemed not to be capable of rehabilitation and sentenced to death, this purpose of punishment is not effective. As to retribution, while it may not now be recognized as a major objective in our system of punishment, as Lord Justice Denning said,

> "The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objectives of punishment as being deterrent or reformative or preventive and nothing else. . . . The ultimate justification of any punishment is . . . that it is the emphatic denunciation by the community of a crime; and . . . there are some murders which . . . demand the most emphatic denunciation of all, namely the death penalty." Quoted in National Commission on Reform of Federal Criminal Laws, 2 Working Papers 1359 (n. 47) (1970).

And as Mr. Justice Stewart said in his concurring opinion in *Furman v. Georgia, supra,* at 308,

> "On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice and lynch law."

One commentator (Morris R. Cohen, "Moral Aspects of Criminal Law" 49 Yale L. J. 987 at 1011-12), in discussing the retributive theory of punishment said that those who ignore this facet of punishment are only evidencing sentimental foolishness, that if the natural desire for vengeance is not met and satisfied by the orderly procedure of the criminal law there is danger of reversion to the bloody vengeance of the feud and vendetta.

See also: Packer, Comment, "Making the Punishment Fit the Crime" 77 Harv. L. Rev. 1071, 1078.

What, then, of deterrence? Has the petitioner conclusively established that the death penalty deters no significantly greater number of persons from committing murder than does the prospect of life imprisonment?

The studies upon which petitioner relies conclude that the death penalty exerts no discernible influence on the rate of homicides. The truism that one may prove almost anything with statistics is a circumstance that makes one particularly concerned, in a matter as fraught with strong feelings as the desirability of the death penalty, that the statistician be totally objective and free of bias.

It may be accepted that the statistical studies do not prove or disprove the deterrent effect of capital punishment. However, it is also true that these statistical findings do not focus on the various differential factors that are operative in the various jurisdictions which they attempt to pronounce. Social and economic conditions such as population pressure, unemployment rate, influx of racial and ethnic minorities, in addition to such factors as the efficacy of local law enforcement, climate and weather, and the number of attractive

crime targets, all play a significant role in determining the number of homicides, particularly robbery homicides, committed in a certain jurisdiction in a given period of time. The existence of so many influential factors not susceptible of measurement and correlation would impugn the statistical methodology on which petitioner places so much reliance. Clearly the existence of these variables precludes a meaningful comparison between general undifferentiated murder statistics and a single proposed casual factor—that of the existence of the death penalty in a particular jurisdiction.

Secondly, the steady increase of homicides across the nation, presumably caused by social and economic factors, naturally tends to cover up the perceptible deterrent effects of the death penalty which might appear in the antiseptic conditions of the social laboratory.

A third objection to the statistical approach is that it measures the homicide rate in terms of the theoretical existence of the death penalty, that is, the existing statutes and judgments imposing the punishment of death, rather than in terms of the actual existence of the death penalty, that is, executions carried out. During the previous decade in which the dramatic increases in murders were recorded, while juries continued at a relatively stable rate to fix the penalty of death in the appropriate cases, the annual number of executions in the United States dwindled to nothing. In this context, amicus concurs with petitioner's apparent view that the death penalty would be an even greater deterrent were it not for the inordinate delay existing in the courts today which precludes the application of swift punishment to the offender. Interestingly enough, the homicide rate in California was relatively stable in the decade from 1953 to 1963. In 1963, the year of the last execution, except for the one in April of 1967, the rate was 3.8 per hundred thousand population. The rate climbed to 6.0 in 1968 and 6.9 in 1969. The current statistics are even higher (8.7 in 1972) and it is to be noted that nationwide, the murder increase has been marked since the judicially created moratorium on the death penalty in 1967. The period from 1968 through 1973 showed that the number of offenses of murder increased 42% and that the rate per hundred thousand inhabitants was up 35%.

Federal Bureau of Investigation, Uniform Crime Reports, 1973 (September 6, 1974) at pages 6-7.

As Justice Marshall observed in *Powell v. Texas, supra*, 392 U.S. 514 at 531, with general reference to the deterrent effect of criminal sanctions,

> ". . . . The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts."

Amicus submits that the foregoing statement has equal validity when applied specifically to the deterrent effect of the death penalty. It would appear to be a fact that to the rational person the threat of the greater punishment has a greater deterrent effect.

On deterrence, Professor Ball in his article, "The Deterrence Concept in Law and Criminology" notes that the statistical data pertaining to the effectiveness of capital punishment as a deterrent measure is generally

inconclusive. He notes that Jerome Hall has criticized the scientific pretentions of modern, positivistic criminology and has said that the so-called new penology is based upon implicit and unsupported dogmas (Jerome Hall, Criminology).

Deterrence is not the only function of punishment served better in many instances by the existence of the death penalty than by a maximum available punishment of life imprisonment. Despite petitioner's insistence to the contrary, life imprisonment often provides a woefully inadequate method of protecting society through incapacitation or isolation of the offender. In California, life imprisonment means the prisoner is eligible for parole after serving seven years of his term. Cal. Pen. Code § 3046. The myth that paroled murderers do not kill again evaporates upon a perusal of the case reports. In California this is evidenced by, among other cases, *People v. Peete*, 28 Cal.2d 306, 308-09 [169 P.2d 924, 926]; *People v. Purvis*, 52 Cal. 2d 871, 875 [346 P.2d 22, 24]; *People v. Gilbert*, 63 Cal.2d 690, 702 [408 P.2d 365, 372].

It is also to be noted that before this Court on a petition for certiorari is another case from North Carolina, *State v. Jarrette*, October term, 1973, No. 73-6877. In this case a convicted murderer escaped and in the process of escaping, raped a black girl and stabbed to death a white youth. *See State v. Jarrette, supra*, 202 S.E.2d 721. Certainly these are a few of what are many, many examples of the inadequacy of life imprisonment to protect society from such aggressive behavior. Congress and the legislative bodies of the various states are in the best position to determine the effectiveness of a form of punishment and to conclude

that for certain crimes the death penalty is the most effective method of protecting society.

It must be noted that the armed robber or armed burglar commonly faced with a maximum term of life imprisonment if apprehended might well consider himself foolish not to kill his victims or other witnesses if by doing so he would risk only the same penalty—life imprisonment for murder—while increasing multifold his chances of avoiding apprehension. The armed robber of a one-man liquor store operation would not let petitioner's views of the dignity of human life cause him to hesitate for a moment at killing a lonely figure behind the counter at a late hour when no other persons are around to witness such an execution. The same applies to the willingness of the armed robber to kill a police officer in order to avoid apprehension and conviction, when without the death penalty the criminal will risk no added punishment if he does away with his intended captor. This is also true of the "lifer" in a correctional facility who is faced with another life sentence for taking the life of a guard or inmate in prison. Such a sentence would not only be futile but would make a mockery of our system of justice.

We must note the judicial recognition of the deterrent effect of capital punishment which is contained in the reports of this Honorable Court. This Court noted the deterrent effect of capital punishment in *United States v. Jackson*, 390 U.S. 570 at 581, when it was said that the inevitable result of a statute providing for waiver of a jury trial to avoid possibility of a death penalty discouraged the assertion of the Fifth Amendment right to plead not guilty and that it acted to deter the exercise of the Sixth Amendment right to demand a jury trial, that such a provision "chills" the assertion

of these rights by penalizing those who choose to exercise them. It has been recognized that the death penalty is the most severe and awesome penalty known to our law and that the threat of the death penalty has been identified as a factor to be given considerable weight in determining whether a defendant has deliberately waived constitutional rights. *See Parker v. North Carolina,* 397 U.S. 790 at 809-10 (Brennan, J., dissenting).

In *Fay v. Noia,* 372 U.S. 391, 397, 439-40, Noia's attorney testified at the habeas corpus hearing that defendant Noia was motivated not to appeal his case by fear that if successful he might get the death penalty on a retrial. Had he appealed, he would have run a substantial risk of electrocution and, as this Court said, "his was a grisley choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which if successful might well have led to a retrial and the death sentence."

In another case, *North Carolina v. Alford,* 400 U.S. 25 at 40, in the dissenting opinion by Mr. Justice Brennan it was said that "it is sufficient to state that Alford *was 'so gripped by fear of the death penalty'* that his decision to plead guilty was not voluntary but was the product of duress as much so as the choice reflecting physical constraint." (Emphasis added).

It is submitted that state legislatures, as well as the Congress, can also conclude that the existence of the death penalty for certain heinous crimes might cause some potential murderers to be "so gripped by fear" that they would be deterred from criminal endeavors and would refrain from the firing of a gun at the lonely clerk standing in a liquor store or the police officer

attempting to effect an arrest. As the Joint Report of the Legislative Committee on Capital Punishment of Pennsylvania said, "The plain fact is that it can never be known how many persons are actually deterred by threat of punishment whether capital or otherwise." It is also said that if capital punishment is so unique, so abhorrent and so fearsome it seems inconceivable that a rational person trying to decide whether to commit a capital crime would ignore the potential penalty of death.

See Wheeler, "Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia" 25 Stan. L. Rev. 62 at 76.

It must be recognized that the innocent life saved when the potential murderer is "so gripped by fear" of the death penalty as to hold his fire and refrain from taking someone's life is not reflected in the statistics surveyed by the social scientists.

Petitioner, an undeterred murderer, assures us that the death penalty does not deter. The fact that it does not deter *all* is no reason for rejecting this form of punishment (particularly by constitutional mandate). The statistics to which he refers lump the undeterrable murders with those that could possibly be deterred. Studies of murder rates and their relationship to the death penalty would be valid only if they were limited to deterrable homicides involving a course of criminal conduct understandingly embarked upon, such as armed robbery, collection of insurance on the victim's life, kidnapping for ransom, etc.

At this point it may be well to refer to some information collected by those who have first-hand information concerning the deterrent effect of capital punishment, namely, those who deal with homicidal offenders.

Sheriff Peter Pitchess of Los Angeles County, testified before the California Senate Committee on the Judiciary (1960) as follows:

> "But I can tell you that the overwhelming majority of people in law enforcement—the ones who are dealing with these criminals, the ones who are seeing them not as statistics but real live human beings, and who are studying their human behavior—are overwhelmingly convinced that capital punishment is a deterrent."

Likewise the late J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated his unqualified opposition to the abolition of capital punishment in an issue of the Uniform Crime Reports for the United States (1959 issue):

> "The professional law enforcement officer is convinced from experience that the hardened criminal has been and is deterred from killing based on the prospect of the death penalty. . . . For the law enforcement officer the time-proven deterrents to crime are sure detection, swift apprehension, and proper punishment. Each is a necessity ingredient."[4]

There have been many surveys conducted to test the deterrent effect of the threat of the death penalty. One is the study by the Los Angeles Police Department on Capital Punishment concluded in February, 1971. This survey confirmed the validity of the conclusion

[4]It may be noted that the Los Angeles Times (Nov. 16, 1966, Part I, p. 21) reported that "The Prison Officers Assn. of Great Britain has demanded the return of the death penalty, stating that since abolition of capital punishment . . . 'There is nothing to deter the growing number of long-term criminals from killing prison officers in an attempt to escape.' "

drawn by innumerable legislatures that the threat of the death penalty is a deterrent to murder and the incidents documented in the surveys are from contacts with criminals which are real and direct rather than merely academic. We, of course, do not imply that all those whose experience with the criminal world is purely academic conclude otherwise. One example is Van Den Haag, "On Deterrence and the Death Penalty" 60 J. Crim. L. C. and P. S. 141 (June, 1969).

The Los Angeles Police Department survey, embodied in a 62-page report, was conducted between December 21, 1970, and February 4, 1971, and involved the interviewing of 316 arrestees. Unarmed suspects were asked why they did not arm themselves, and armed suspects who did not use their weapons were asked why they did not. Of the 316 persons interviewed, 217 denied their crime or refused a statement, primarily out of a desire not to jeopardize their case. The positive statements made by the remaining 99 are classified as follows:

1.	Deterred by fear of death penalty from carrying weapon or operative weapon	50 (50.5%)
2.	Unaffected by death penalty because it was no longer being enforced	7 (7.07%)
3.	Undeterred by death penalty, would kill whether it was was enforced or not	10 (10.1%)
4.	Unaffected by death penalty because they would not carry weapon in any event, primarily out of fear of being injured themselves or of injuring someone else	32 (32.3%)

The conclusions drawn from the study are as follows:

> "I. The adoption of an effectively enforced death penalty system is a deterrent in the prevention of homicides.
>
> "II. Though the death penalty has not been removed from the statutes in California, many suspects believe in reality that no death penalty exists as it is not being enforced.
>
> "III. Some suspects, while realizing that the California death penalty exists in name only, disclose that the certainty of an executed death penalty would deter them from being armed while committing crimes."

The report also notes, "If this study contained only one and not the 50 documented cases supporting the fact that the death penalty is a deterrent, there should be no question of its retention and enforcement. In 1970 in the City of Los Angeles, 394 innocent people were victims of an unlawful execution without the right of due process of law."

On the basis of objective criteria, the report compiled and selected 25 case histories from the 99 individuals who made positive statements. Of the 25 arrestees, 16 were under arrest for robbery, 4 for burglary, 3 for felonious assault, and 2 for rape; and 10 were armed when arrested while 15 were not. The 25 statements are set forth in Appendix C.

An earlier survey by the Los Angeles Police Department is reported in *People v. Love*, 56 Cal.2d 720, 735-37 [336 P.2d 33, 41-42] (McComb, J. dissenting). The examples presented are contained in Appendix D.

It would appear that what this court has previously noted is ably supported by the foregoing, that is, that certain potential murderers are "so gripped by fear of the death penalty" that they refrain from taking life endangering action when in pursuit of their criminal enterprises, or, better yet, they do not engage in such enterprises at all.

Petitioner refers to these surveys and the statements of the law enforcement officers as "impressionistic accounts" (Br. for Pet., p. 128 n. 207) or as "anecedotal impressions" of law enforcement officers (Br. for Pet., Appendix E, p. 1e). It is clear that Congress and the legislatures of the various states have not treated so cavalierly these surveys and the testimony of those who come into daily contact with the criminal.

Likewise, in petitioner's Appendix E, petitioner has listed some of his conclusions regarding the utility of capital punishment, with particular reference to its deterrent effect. Amicus contends that the Constitution does not permit social scientists (Br. for Pet., Appendix E, pp. 3e-6e), law enforcement officers (pp. 7e-9e), or the undeterred prison inmate (pp. 9e-10e) who has committed murder to fashion the contours of the Eighth Amendment.

It is submitted that petitioner has failed to show that the death penalty serves no legitimate function in our society. As a consequence, the United States Constitution leaves the Congress and the legislatures of the various states, the elected representatives of the People, free to determine that the protection of society under present conditions requires death as a form of punishment for certain serious crimes.

F. Contemporary Society Recognizes Capital Punishment as a Permissible Form of Punishment in Its Arsenal to Combat Crime

Petitioner asserts that society has rejected capital punishment and that this "rejection" must be finalized by means of an Eighth Amendment interpretation by this Court.

However, petitioner is quick to admit that, "thirty jurisdictions have enacted death penalty legislation since *Furman*" (Br. for Pet., p. 131), adding that the legislation is narrower in all but two cases, than their pre-*Furman* authorizations of capital punishment. The response of the majority of states to accomplish the restoration of capital punishment is documented in Petitioner's Brief, Appendix A.

It is difficult to accept petitioner's argument on rejection when the elected representatives of the People in a majority of the states have so quickly responded to assure their constituents the protection of this sanction.

Petitioner also seems to argue that society has rejected capital punishment because, he asserts, prosecutors are not bound by rigid charging and plea acceptance rules, juries are not restricted in their findings on the facts, and governors and presidents are permitted to grant clemency; further, it appears that he contends that this punishment is only meted out to "racial minorities and to the poor."

Petitioner offers no proof of the validity of his legal assertions or of his factual claims and he is hard pressed in his attempt to make his "rejection by society" arguments appear realistic. Yet he asks this Court to accept his speculative arguments and to make a constitutional judgment based thereon!

Petitioner implies that it is only vengeful and misguided people, out of step with the "evolving standards of decency that mark the progress of a maturing society", who are in favor of the death penalty today. It is submitted that there are innumerable indicia of the public's continued general acceptance of the death penalty as a necessary form of punishment consistent with contemporary religious and moral standards of decency and the dignity of man.

While amicus wishes to emphasize that the meaning of the cruel and unusual punishment clause cannot expand and contract with the ebb and flow of something as fickle as public opinion as reflected in polls and surveys, nevertheless, since those who seek the abolition have relied on such indicators in support of their various contentions that the death penalty is out of favor with all but the police, prosecutors, and a few misguided others, amicus feels compelled to put this contention in the proper perspective.

Public sentiment has swung strongly in favor of the death penalty since this Court, citing a 1966 Gallop poll, characterized the United States as a nation less than half of whose people believed in the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 520. It is submitted that the recent polls demonstrate that public opinion has swung in favor of capital punishment. This has been illustrated not only in the Gallop polls that have been taken but also in the elections relating to retention or abolition of the death penalty.

Of course, the most recent large scale expression of public opinion, as far as California is concerned, occurred in 1972 when the death penalty initiative passed by an overwhelming majority, over 67% of the

voters voting in favor of the initiative (5,386,904 votes to restore the death penalty) and to enable the state to be restored to the constitutional balance in which the legislative branch was to make the determination as to whether capital punishment should be retained or abolished.

A similar referendum was held on December 15, 1970, when the voters of the State of Illinois, in conjunction with a vote on whether to ratify the new constitution adopted by their constitutional convention, were asked to ballot as to whether the death penalty should be abolished in that jurisdiction. The referendum results were comparable to the results later obtained in California, and serve as a good indication of the national sentiment, in view of the fact that Illinois is another large state having a substantial metropolitan and rural population. The referendum resulted in 64.3% vote against the abolition of capital punishment.

In addition, Congress has acted recently on this question. On July 17, and July 23, 1974, the House and Senate, respectively, adopted the conference report on the bill relating to aircraft hijacking which contained a death penalty provision. Cong. Quarterly, Weekly Report, No. 30, page 1983. The death penalty is now mandatory for airline hijackers who commit murder or cause a death indirectly (Public Law 93-366; U.S. News and World Report, page 30, January 20, 1975).

The popular sentiment in favor of the death penalty as a necessary form of punishment is reflected in the number of American jurisdictions that retained this penalty at the time that this Court spoke in *Furman*

v. Georgia, supra. At that time, the District of Columbia, the federal government, and forty of the fifty states retained capital punishment as a form of punishment for certain crimes. At the time *Furman* was decided, despite almost five years of the "moratorium", there were over 600 prisoners committed to prisons on judgments of death.

It is submitted that another accurate barometer of the "evolving standards" was the constant number of defendants whom juries annually sent to the nation's prison systems under sentence of death. U.S. Bureau of Prisons, National Prisoner Statistics Bulletin: Capital Punishment 1930-1968 (August, 1968). It would appear that juries are continuing to perform their function in maintaining a link between contemporary community values and the penal system. *Witherspoon v. Illinois, supra,* at 519 n.15.

The large majority of persons convinced of the need for capital punishment in America reflects a cross section of the nation's population. It is submitted that these persons, including retail clerks, grocery and liquor store operators, pharmacists, bank tellers, gas station attendants and others who, like police officers, have frequent occasion to look down the "business end" of a robber's pistol or shotgun, do not share this petitioner's sentiment that the death penalty is a barbaric relic of the past. In short, contrary to the impression that petitioner seeks to convey, there appears to be substantial support for the death penalty in almost all social, economic and occupational groups, and indeed, the preponderance of public opinion is in favor of retaining the death penalty as one of the forms of punishment available for serious offenses.

Petitioner apparently believes that this Court should respond to what he terms the "world-wide" trend toward ending the use of the death penalty. It is submitted that this is a frail foundation upon which to postulate the unconstitutionality of the death penalty in this country. It is ridiculous to say that the Framers of the Eighth Amendment had in mind in 1789 that what nations did throughout the world should impair the ability of the various states to provide adequate punishment for those who violate the laws of the state. Certainly the availability of the death penalty for the protection of society was not to be judged by what occurred in countries such as Lichtenstein, Luxembourg, Surinam or Mozambique.

It has been stated that the total number of nations which are abolitionist represent a minority in the world community and it is to be noted that the conditions that lead any one of the foreign jurisdictions to conclude that a particular punishment is or is not required for the protection of its population varies from nation to nation as conditions vary from state to state within our own federal republic. It is further to be noted that petitioner has not pointed to any abolitionist nation which has rejected the death penalty by judicial declaration or edict.

Patrick, "The Status of Capital Punishment: A World Perspective" (December 1965), 56 Jour. Crim. L. COPS 397, 411; Royal Commission on Capital Punishment, 1949-1953 Report 340.

Amicus understands that in England, which retains capital punishment for certain crimes as do many "abolition" nations, the House of Commons recently rejected a bill to restore capital punishment for certain

violent crimes (See Br. for Pet., p. 115 n.174). Amicus finds it reassuring that a nation, sharing a common heritage with the United States, still permits decisions as to the utility and availability of capital punishment to be determined by the elected representatives of the People!

Amicus submits that petitioner cannot sustain his claim that contemporary society rejects capital punishment. It is further evident that even if he could sustain this claim, he would state no case for the invalidation of the death penalty on a new interpretation of the Eighth Amendment by this Honorable Court.

Conclusion

In an era characterized by rising crime rates, mass killings, inmate homicides, revolutionary bombings of public buildings, and the assassination of public figures and law enforcement officers, it would be inappropriate for a legislature to contravene the intent of the Framers and the will of the People by abolishing capital punishment. How much less appropriate would it be for this Court, under the aegis of the Eighth Amendment, to decree that this form of punishment, expressly sanctioned by the words of the Constitution and a long line of decisions by this Court, is now forbidden to the People.

It is submitted that nothing has happened in the 185-year history of the Constitution which can alter the fact that the Framers contemplated the death penalty as a form of punishment of necessity available to the People and the states for the protection of society. Likewise, there has been no decision of this Court contravening the intent of the Framers and contem-

porary society has accepted this sanction as a proper weapon to combat crime.

Amicus respectfully submits that no case has been made by petitioner for this Court to take the unprecedented step of invalidating Congressional acts and state statutes providing for the death penalty on the ground that this punishment is now "cruel and unusual."

Respectfully submitted,

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APPENDIX A

[Death Penalty]

SEC. 27. All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.

The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article I, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution. [New section adopted November 7, 1972. Initiative measure.]

APPENDIX B

CHAPTER 719

An Act to Amend Section 1018 of, to add Sections 190, 190.1, 190.2, 190.3, 209, 219, and 4500 to, and to Repeal Sections 190, 190.1, 209, 219, and 4500 of, the Penal Code, Relating to Punishment for Crimes.

[Approved by Governor September 24, 1973.
Filed with Secretary of State September 24, 1973.]

The people of the State of California do enact as follows:

SECTION 1. Section 190 of the Penal Code is repealed.

SEC. 2. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death if any one or more of the special circumstances enumerated in Section 190.2 have been charged and found to be true in the manner provided in Section 190.1. Every person otherwise guilty of murder in the first degree shall suffer confinement in the state prison for life. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

SEC. 3. Section 190.1 of the Penal Code is repealed.

SEC. 4. Section 190.1 is added to the Penal Code, to read:

190.1. In any case in which the death penalty is to be imposed as the penalty for an offense only upon

the finding of the truth of the special circumstances enumerated in Section 190.2, the guilt or innocence of the person charged shall first be determined without a finding as to penalty. In any such case the person charged shall be represented by counsel. If such a person has been found guilty of such an offense, and has been found sane on any plea of not guilty by reason of insanity, and any one or more of the special circumstances enumerated in Section 190.2 have been charged, there shall be further proceedings on the issue of the special circumstances charged. In any such proceedings the person shall be represented by counsel. The determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented. In case of a reasonable doubt whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of a crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of the defendant's counsel, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of his counsel. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury, in which case a new jury shall be drawn to determine the issue

of whether or not any of the special circumstances charged are true or not true.

If the trier of fact finds, as to any person convicted of any offense under Section 190 requiring further proceedings that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, the defendant shall suffer the penalty of death, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prohibit the imposition of such penalty.

In any case in which the defendant has been found guilty by a jury, and the same or another jury is unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all of such special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be retried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach a unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose the punishment of confinement in the state prison for life.

SEC. 5. Section 190.2 is added to the Penal Code, to read:

190.2. The penalty of a person found guilty of first-degree murder shall be death in any case in which the

trier of fact pursuant to the further proceedings provided for in Section 190.1 makes a special finding that:

(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. "An agreement," as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim.

(b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:

(1) The victim is a peace officer, as defined in Section 830.1, subdivision (1) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceedings.

(3) The murder was willful, deliberate and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery, in violation of Section 211.

(ii) Kidnapping, in violation of Section 207 or Section 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute kidnapping within the meaning of this paragraph.

(iii) Rape by force or violence, in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm, in violation of subdivision (3) of Section 261.

(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14, in violation of Section 288.

(v) Burglary, in violation of subdivision (1) of Section 460, of an inhabited dwelling housing entered by the defendant with an intent to commit grand or petit larceny or rape.

(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.

SEC. 6. Section 190.3 is added to the Penal Code, to read:

190.3 (a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of 18 years at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of facts finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37 or 128, the death penalty shall not be imposed upon any person who is a principal in the commission of a capital offense unless he was personally present during the commis-

sion of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts.

SEC. 7. Section 209 of the Penal Code is repealed.

SEC. 8. Section 209 is added to the Penal Code, to read:

209. Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death in cases in which any person subjected to any such act suffers death, or shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers bodily harm, or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where no such person suffers death or bodily harm.

Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under Section 209 as it read prior to September 22, 1951, shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole.

SEC. 9. Section 219 of the Penal Code is repealed.

SEC. 10. Section 219 is added to the Penal Code, to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with death in cases in which any person subjected to any such act suffers death as a proximate result thereof, or imprisonment in the state prison for life without the possibility of parole in cases where any person suffers bodily harm as a proximate result thereof, or imprisonment in the state prison for life, with the possibility of parole, in cases where no person suffers death or bodily harm as a proximate result thereof.

SEC. 11. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be put in by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty to a capital offense which does not require the further proceedings pro-

vided for in Section 190.1 shall be received from a defendant. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall find that the defendant understands his rights to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 12. Section 4500 of the Penal Code is repealed.

SEC. 13. Section 4500 is added to the Penal Code, to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another, other than another inmate, with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, or the person so assaulted is another inmate, the punishment

shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 14. Notwithstanding Section 2164.3 of the Revenue and Taxation Code, there shall be no reimbursement pursuant to this section nor shall there be any appropriation made by this act because the duties, obligations or responsibilities imposed on local government by this act are minor in nature and will not cause any financial burden to local government.

SEC. 15. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provision or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

APPENDIX C

Statements of Arrestees Compiled by the Los Angeles Police Department's Study of the Deterrent Effect of the Death Penalty, February 1971

1. (unarmed robber) "Since in reality there is no death penalty in California, I would kill to obtain what I want."

2. (armed robber) "I used a pellet gun because I didn't want to kill anyone and be put to death in the gas chamber."

3. (unarmed burglar) "I don't carry a gun. I don't want to be shot at by police and am afraid of the death penalty."

4. (armed robber) "I used an unloaded gun in the robbery of a market so I would not hurt anyone and because I am afraid of the death penalty."

5. (armed robber) "The gun was unloaded because I didn't want to hurt anyone. I know the punishment would be greater if I shot anyone during a robbery."

6. (armed robber) "I would be afraid to use a gun because of possible death penalty."

7. (armed attempted murderer) "I would have shot it out if necessary, the death penalty is no deterrent."

8. (armed robber) "I used a blank revolver because I'm an ex-con."

9. (unarmed robber) "I would not use a gun, I am afraid of the consequences of the death penalty."

10. (unarmed burglar) "I never owned a gun because I'm afraid of the death penalty."

11. (unarmed burglar) "If I was armed I would not have used the weapon, I am afraid of the gas chamber."

12. (unarmed robber) "I didn't use a gun because I was afraid of being shot."

13. (armed suspect charged with assault with a deadly weapon) "I would kill if I had the chance, I'm not afraid of any courts. They are easy."

14. (unarmed attempted robber) "I am waiting for the death penalty to be removed, then everything is free."

15. (unarmed forceable rapist) "I don't carry a gun because I'm afraid of getting the death penalty."

16. (unarmed burglar) "Because of the death penalty, I would never arm myself."

17. (unarmed forceable rapist) "I have gotten into too much trouble before when I had a gun."

18. (armed suspect charged with assault with intent to commit murder) "Even if a death occurred as a result of a shooting, I am not afraid because no one believes in the death penalty anymore."

19. (unarmed robber) "I am afraid of the death penalty. I wasn't armed."

20. (unarmed robber) "I used a toy gun, I didn't want to hurt anyone."

21. (unarmed robber) "I don't carry a gun, I might shoot someone accidentally, I'm afraid of the death penalty."

22. (unarmed burglar) "I'm an ex-con, I would be an idiot to carry a gun. Punishment would be too great."

23. (armed robber) "I didn't want to hurt anyone, I had an empty gun."

24. (unarmed robber) "I would use weapon if I got into a bind. It doesn't make any difference, no one goes to the gas chamber."

25. (armed robber) "I would use gun if necessary, but I fear the death penalty."

APPENDIX D

Examples of Deterrent Effect of Threat of Death Penalty Taken From Records of the Los Angeles Police Department and Reported in People v. Love, 56 Cal. 2d 720, 735-37 [366 P.2d 33, 41-42] (McComb, J., dissenting).

(i) Margaret Elizabeth Daly, of San Pedro, was arrested August 28, 1961, for assaulting Pete Gibbons with a knife. She stated to investigating officers: "Yeh, I cut him and I should have done a better job. *I would have killed him but I didn't want to go to the gas chamber.*"

(ii) Robert D. Thomas, alias Robert Hall, an ex-convict from Kentucky; Melvin Eugene Young, alias Gene Wilson, a petty criminal from Iowa and Illinois; and Shirley R. Coffee, alias Elizabeth Salquist, of California, were arrested April 25, 1961, for robbery. They had used toy pistols to force their victims into rear rooms, where the victims were bound. When questioned by the investigating officers as to the reason for using toy guns instead of genuine guns, all three agreed that real guns were too dangerous, *as if someone were killed in the commission of robberies, they could all receive the death penalty.*

(iii) Louis Joseph Turck, alias Luigi Furchiano, alias Josephy Farino, alias Glenn Hooper, alias Joe Moreno, an ex-convict with a felony record dating from 1941, was arrested May 20, 1961, for robbery. He had used guns in prior robberies in other states but simulated a gun in the robbery here. He told investigating officers that he was aware of the California death penalty although he had been in this state for only one month, and said, when asked why he had only simulated a gun, "*I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber.*"

(iv) Ramon Jesse Velarde was arrested September 26, 1960, while attempting to rob a supermarket. At that time, armed with a loaded .38 caliber revolver, he was holding several employees of the market as hostages. He subsequently escaped from jail and was apprehended at the Mexican border. While being returned to Los Angeles for prosecution, he made the following statement to the transporting officers: "I think I might have escaped at the market if I had shot one or more of them. *I probably would have done it if it wasn't for the gas chamber.* I'll only do 7 or 10 years for this. I don't want to die no matter what happens, you want to live another day."

(v) Orelius Mathew Stewart, an ex-convict, with a long felony record, was arrested March 3, 1960, for attempted bank robbery. He was subsequently convicted and sentenced to the state prison. While discussing the matter with his probation officer, he stated: "The officer who arrested me was by himself, and if I had wanted, I could have blasted him. *I thought about it at the time, but I changed my mind when I thought of the gas chamber.*"

(vi) Paul Anthony Brusseau, with a criminal record in six other states, was arrested February 6, 1960, for robbery. He readily admitted five holdups of candy stores in Los Angeles. In this series of robberies he had only simulated a gun. When questioned by investigators as to the reason for his simulating a gun rather than using a real one, he replied that *he did not want to get the gas chamber.*

(vii) Salvador A. Estrada, a 19-year-old youth with a four-year criminal record, was arrested February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officers: "I want to ask you one question, do you think they will repeal the capital punishment law. *If they do, we can kill all you cops and judges without worrying about it.*"

(viii) Jack Colevris, a habitual criminal with a record dating back to 1945, committed an armed robbery at a supermarket on April 25, 1960, about a week after escaping from San Quentin Prison. Shortly thereafter he was stopped by a motorcycle officer. Colevris, who had twice been sentenced to the state prison for armed robbery, knew that if brought to trial, he would again be sent to prison for a long term. The loaded revolver was on the seat of the automobile beside him, and he could easily have shot and killed the arresting officer. By his own statements to interrogating officers, however, *he was deterred from this action because he preferred a possible life sentence to death in the gas chamber.*

(ix) Edward Joseph Lapienski, who had a criminal record dating back to 1948, was arrested in December 1959 for a holdup committed with a toy automatic type pistol. When questioned by investigators as to why he had threatened his victim with death and had not provided himself with the means of carrying out the threat, he stated, "*I know that if I had a real gun and killed someone, I would get the gas chamber.*"

(x) George Hewlitt Dixon, an ex-convict with a long felony record in the East, was arrested for robbery and

kidnapping committed on November 27, 1959. Using a screwdriver in his jacket pocket to simulate a gun, he had held up and kidnaped the attendant of a service station, later releasing him unharmed. When questioned about his using a screwdriver to simulate a gun, this man, a hardened criminal with many felony arrests and at least two known escapes from custody, indicated his fear and respect for the California death penalty and stated, "*I did not want to get the gas.*"

(xi) Eugene Freeland Fitzgerald, alias Edward Finley, an ex-convict with a felony record dating back to 1951, was arrested February 2, 1960, for the robbery of a chain of candy stores. He used a toy gun in committing the robberies, and when questioned by the investigating officers as to his reasons for doing so, he stated: "I know I'm going to the joint and probably for life. *If I had a real gun and killed someone, I would get the gas. I would rather have it this way.*"

(xii) Quentin Lawson, an ex-convict on parole, was arrested January 24, 1959, for committing two robberies, in which he had simulated a gun in his coat pocket. When questioned on his reason for simulating a gun and not using a real one, he replied that *he did not want to kill someone and get the death penalty.*

(xiii) Theodore Roosevelt Cornell, with many aliases, and ex-convict from Michigan with a criminal record of 26 years, was arrested December 31, 1958, while attempting to hold up the box office of a theater. He had simulated a gun in his coat pocket, and when asked by investigating officers why an ex-convict with everything to lose would not use a real gun, he replied, "*If I used a real gun and shot someone, I could lose my life.*"

(xiv) Robert Ellis Blood, Daniel B. Gridley, and Richard R. Hurst were arrested December 3, 1958, for attempted robbery. They were equipped with a roll of cord and a toy pistol. When questioned, all of them stated that they used the toy pistol because *they did not want to kill anyone, as they were aware the penalty for killing a person in a robbery was death in the gas chamber.*

Supreme Court, U. S.
MAR 13 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

—vs—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF
NORTH CAROLINA

MOTION OF THE ATTORNEY GENERAL OF THE STATE OF UTAH FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, AMICUS CURIAE

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State of Utah
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-7031

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—vs—

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

MOTION OF THE ATTORNEY GENERAL OF THE STATE OF UTAH FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Comes now the State of Utah, by and through its authorized representative, Vernon B. Romney, Attorney General, State of Utah, and hereby moves this Honorable Court for permission to file the following Brief Amicus Curiae pursuant to Rule 35, Supreme Court of the United

States Revised Rules, as amended, January 15, 1974. Said motion is based upon the fact that the State of Utah has an interest in the outcome of this case, and specifically has an interest in the Court's resolution of the question whether capital punishment, *ipso facto*, is cruel and unusual punishment within the meaning of the Eighth Amendment to the Constitution of the United States.

Dated this 10th day of January, 1975.

VERNON B. ROMNEY
Attorney General
State of Utah

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

—vs—

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NORTH CAROLINA

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, AMICUS CURIAE

INTEREST OF AMICI

Among its several issues, *Fowler v. North Carolina*, No. 73-7031, presents to this Court the question of whether capital punishment, *ipso facto*, is cruel and unusual punish-

ment within the meaning of the Eighth Amendment to the Constitution of the United States. An adverse decision would have a substantial impact on the criminal judicial system in many states, including Utah. Such a decision would deny unto the states the right to proscribe capital punishment in a fair and just manner for the most aggravated and indefensible of crimes.

STATEMENT OF THE CASE

On July 1, 1973, petitioner got into an argument over a ten dollar bill with the victim while they were involved in a crap game in Raleigh, North Carolina. Later in the day, petitioner left the crap game and went to a local lounge. He was joined there by Griffin and the argument over the money was resumed. The petitioner was asked by Griffin to step outside and when he did so, Griffin struck him breaking his nose. Petitioner went home but later decided to visit a friend who lived in the vicinity where the shooting occurred. When he arrived in the area, Griffin saw him and said he wanted to fight again. Petitioner left the area, but returned shortly and when he saw Griffin walking toward him, he fired twice, striking the victim with the second shot. Griffin died the same day from the wound and on September 27, 1973, petitioner was convicted in the Superior Court of Wake County for first degree murder and sentenced to death.

On Appeal, the North Carolina Supreme Court found no prejudicial error and the judgment was upheld. *State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974). This Court granted Certiorari on October 29, 1974.

ARGUMENT

POINT I

CAPITAL PUNISHMENT, *IPSO FACTO*, IS NOT CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The United States Supreme Court has long sought to find a working definition of the Cruel and Unusual Punishment Clause of the Eighth Amendment. In *Trop v. Dulles*, 356 U.S. 86, 99, 1 L.Ed.2d 630, 78 S.Ct. 590 (1958), it was concluded that "the exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court."

It is a long established principle of law that in construing a constitutional amendement the Supreme Court should read the language in connection with the known condition of affairs out of which the occasion for the amendment's adoption may have arisen, and then construe it in a way as to forward the known purpose or object for which the amendment was adopted. *Maxwell v. Dow*, 176 U.S. 581, 602, 44 L.Ed. 597, 20 S.Ct. 448 (1900).

The English Declaration of Rights of 1688 contained the clause that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." I Wm. & Mary, 2d Sess., 192 (1689). The language was transferred verbatim into the Virginia Constitution in 1774 and thereafter adopted by eight other

states and inserted by the federal govrnment into the Northwest Ordinance of 1787. See R. Rutland, *The Birth of the Bill of Rights* 1776-1791, at 30-33 (1955).

The entire clause was adopted and made a part of the Bill of Rights as the Eighth Amendment of the United States Constitution in 1791 with very little discussion. *Weems v. United States*, 217 U.S. 349, 368-69, 54 L.Ed. 793, 30 S.Ct. 544 (1910). However, it is generally accepted that the Eighth Amendment was intended to prohibit the cruel and barbarous punishments formerly imposed in England by the Crown. These punishments were considered at the time to be unnecessarily cruel and bordering upon outright torture, including breaking on the wheel, public dissection and the like. IV Blackstone's Commentaries 376; *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879).

It is important to note that before and after the adoption of the Eighth Amendment, capital punishment for most felonies was the standard practice in all the colonial states. 2 *The Papers of Thomas Jefferson* 313 (J. Boyd ed. 1950). For example, Deleware laws provided for the following penalties: death by hanging, drawing and quartering for the crime of treason; death by burning for the crime of petit treason; and death by hanging for murder and most felonies. It was not until 1826 that the criminal laws were codified in Delaware to provide that all punishment by death shall be by hanging. *State v. Cannon*, 55 Del. 587, 190 A.2d 514, 516-17 (1963).

In summing up the constitutional origin of the Eighth Amendment, Mr. Justice Black in *McGautha v. Califor-*

nia, 402 U.S. 183, 28 L.Ed.2d 711, 91 S.Ct. 1454 (1971), said:

> "The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment." 408 U.S. at 381.

Throughout its history, the United States Supreme Court has recognized the constitutionality of capital punishment in many cases, including *Wilkerson v. Utah, supra; In Re Kemmler*, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); *Weems v. United States, supra; Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 91 L.Ed. 442, 67 S.Ct. 374 (1947); *Trop v. Dulles, supra; Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968); *MaGautha v. California, supra.*

In *Wilkerson v. Utah, supra*, capital punishment was implicitly upheld when the Court refused to strike down shooting as a cruel and unusual mode of executing a prisoner. The Court held the constitution prohibited circumstances of terror, pain, or disgrace, but that death was a usual punishment for murder. 99 U.S. at 136.

In Re Kemmler, supra, presented the Court with the question as to whether New York's innovative idea of electrocution was cruel and unusual. Although the Court disposed of the case on the ground that the Eighth Amend-

ment was not applicable to the states through the Due Process Clause of the Fourteenth Amendment, it went on to say:

> "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." 136 U.S. at 447.

The modern case of most significance is *Trop v. Dulles, supra,* in which Chief Justice Warren offered this conclusion:

> "(L)et us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment--and they are forceful--the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty." 356 U.S. at 99.

In *Trop* the Chief Justice also turned to the meaning of the word "unusual":

> "Whether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. . . . If the word 'unusual' is to have any meaning apart from the word 'cruel', however, the meaning should be the ordinary one, signifying something different from that which is generally done." 356 U.S. at 100 n.32.

During the two hundred year history of our nation capital punishment has been widely used and generally accepted. Unusual punishment is that which is atypical of and not endemic to the mores of the current social order and irregular and unwonted in the administration of criminal justice. Our society expects and demands justice or retribution when certain types of crimes are committed. The social importance for maintaining that capital punishment is not in violation of the Constitution can be summed up in the words of Mr. Justice Stewart in *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972):

> "On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve' then there are sown the seed of anarchy--of self-help, vigilante justice, and lynch law." 408 U.S. at 308.

POINT II

CAPITAL PUNISHMENT PROSCRIB-

ED UNDER A REASONABLE AND CONTROLLED DISCRETION DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

In *Furman v. Georgia, supra,* this Court held that capital punishment was unconstitutional in cases where discretionary sentencing procedures resulted in arbitrary and discretionary application of the penalty.

Although nine separate opinions were written in *Furman,* one common concern can be inferred from the concurring opinions. It is best summed up by Mr. Chief Justice Burger in his dissent:

> "The decisive grievance of the [concurring] opinions--not translated into Eighth Amendment terms--is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern." 408 U.S. at 398.

Although the Court held that the Texas and Georgia death penalty statutes were unconstitutional, a majority did not find that capital punishment per se was unconstitutional. 408 U.S. at 375. Thus, the decision did not preclude state legislatures from attempting to enact constitutionally acceptable death penalty laws, and in the two years since *Furman,* more than half the states have enacted statutes which either specify the factors to be weighed by

the sentencers in deciding when to impose a capital sentence or require the death penalty for certain offenses.[1]

In 1973, the Utah Legislature drafted a new criminal code designed to overcome the United States Supreme Court's concern with arbitrariness. Murder in the first degree was designated as a capital offense in that new code. Utah Code Ann. § 76-5-202 (Supp. 1973), states:

> "(1) Criminal homicide contitutes murder in the first degree if under circumstances not constituting manslaughter, the actor intentionally or knowingly causes the death of another under any of the following circumstances:
>
> (a) The homicide was committed by a convict under sentence of imprisonment.
>
> (b) At the time the homicide was committed the actor also committed another homicide.

---

[1] *See* Ariz. Rev. Stat. Ann. §§ 13-452, 1454 (Supp. 1973); Ark. Stat. Ann. §§ 41-4702, -4710 to -4714 (Cum. Supp. 1973); Cal. Penal Code §§ 189, 190.1-3, 209 (West Supp. 1974); P.A. 73-137, [1973] Conn. Leg. Serv. 184 (West); Del. ch. 284, 127th General Assembly (March 29, 1974); Fla. Stat. Ann. §§ 782.04, 794.01, 921.141 (Cum. Supp. 1974); Ga. Code §§ 26-3102, 27-2534.1, -2537 (Supp. 1973); ch. 276, [1973] Idaho Laws 588; Ill. Rev. Stat. ch. 38,§§ 9-1, 1005-5-3, -8-1A (1973); Ind. Ann. Stat. § 10-3401 (Supp. 1973); Ky. ch. 406, §§ 60, 61, 275, 1974 General Assembly (Apr. 2, 1974); La. Rev. Stat. Ann. § 14:30 (Supp. 1974); Miss. ch. 576, 1974 General Assembly (Apr. 23, 1974); Mont. Rev. Codes Ann. § 94-5-105 (Spec. Crim. Code Supp. 1973), *as amended,* ch 262, 43rd Legislative Assembly (March 21, 1974); Neb. Rev. Stat. §§ 28-401, 29-2521 to -2523 (Supp. 1973); Nev. Rev. Stat. § 200.030 (1973); N.H. ch. 34, 1974 General Court Spec. Sess. (Apr. 3, 1974); N.M. Stat. Ann. § 40A-29-2 (Supp. 1973); N.Y. ch. 376, 1974 Legislative Assembly (May 6. 1974); N.C. ch. 20, 1973 General Assembly,2d Sess. (Apr. 8, 1974); Ohio Rev. Code Ann. §§ 2903.02-04 (Page Spec. Supp. 1973); Okla. Stat. Ann. tit. 21, § 701.1-3 (Supp. 1973); Pa. Act No. 46, 158th General Assembly (March 26, 1974); R.I. Gen. Laws Ann. § 11-23-2 (Supp. 1973); Tenn. Code Ann. §§ 39-2402, -2406 (Cum. Supp. 1973); Wyo. Stat. Ann. § 6-54 (Supp. 1973).

(c) The actor knowingly created a great risk of death to a person other than the victim and the actor.

(d) The homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, robbery, rape, forcible sodomy, or aggravated sexual assult or arson, burglary, or kidnapping.

(e) The homicide was committed for the purpose of avoiding or preventing an arrest by a peace officer acting under color of legal authority or for the purpose of effecting an escape from lawful custody.

(f) The homicide was committed for pecuniary or other personal gain.

(g) After having previously been convicted of first or second degree murder.

(h) The homicide was committed upon a child under the age of twelve years as the result of physical abuse or neglect.

Failure on the part of a parent, guardian or custodian of a child under the age of twelve years to satisfactorily explain injuries or neglect causing death where suspicious circumstances exist, unless such person can explain his lack of knowledge thereof, shall be deemed prima facie evidence of guilt.

(2) Murder in the first degree is a capital offense."

After a defendant has been found guilty of first degree murder, he is sentenced in compliance with the following two statutes:

"76-3-206. Capital felony—Death or life imprisonment.—A person who has been convicted of a capital felony shall be sentenced in accordance with section 76-3-207, and sentence shall be death or life imprisonment as the court or jury, in accordance with this section, shall determine."

"76-3-207. Capital felony—Hearing on sentence.—(1) When a defendant has been found guilty of a capital felony, there shall be further proceedings before the court or jury on the issue of penalty. The proceedings shall be conducted before the court or jury which found the defendant guilty, provided the defendant may waive hearing before the jury, in which event the hearing shall be before the court. In these proceedings, evidence may be presented as to any matter the court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravated or mitigation of the penalty. Any evidence the court deems to have probative force may be received regardless of its admissibility under the exclusionary rules of evidence. The state's attorney and the defendant shall be permitted to present argument for or against sentence of death. Aggravating circumstances shall include those as outlined in 76-5-202. Mitigating circumstances shall include the following:

(a) The defendant has no significant history of prior criminal activity;

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(c) The defendant acted under extreme duress or under the substantial domination of another person;

(d) At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental disease, intoxication, or influence of drugs;

(e) The youth of the defendant at the time of the crime;

(f) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(g) And any other fact in mitigation of the penalty.

(2) The court or jury, as the case may be shall retire to consider the penalty. In all proceedings before a jury, under this section, it shall be instructed as to the punishment to be imposed upon a unanimous verdict for death and that to be imposed if a unanimous verdict for death is not found. If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death, the court shall discharge the jury and impose the sentence of life imprisonment.

(3) Upon any appeal by the defendant where the sentence is of death, the supreme court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court, in which

event the trial court shall impose the sentence of life imprisonment."

The Utah statutes are drafted to narrow and guide the discretion of the sentencing authority to impose the death penalty only for the most outrageous and shocking types of willful and intentional murder. A defendant can only be convicted of a capital murder if the murder was committed under one of the aggravating circumstances listed in Utah Code Ann. § 76-5-202(1) (Supp. 1973). Even after his conviction, the defendant is provided with three steps between conviction and imposition of the death penalty. Each step provides concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

First, there must be a post-conviction hearing on the issue of the penalty (Section 76-3-207). The statute specifies that "evidence may be presented as to any matter the court deems relevant to sentence," and the exclusionary rules of evidence are not to apply. Therefore, the defendant would be allowed to present evidence at the hearing which might have been barred or withheld from a trial on the issue of guilt or innocence.

Concerning the purpose of allowing the trial judge to determine the relevancy of the evidence in the sentencing hearing, the Florida Supreme Court in *State v. Dixon*, 283 S.2d 1 (Fla. 1974), said:

> "The discretion of the trial judge in determining what evidence might be relevant to the sentence is not unbridled. It is merely a necessary power to avoid a needlessly drawn out pro-

ceeding where one party might choose to go forward with evidence which bears no relevance to the issue being considered." 283 S.2d at 7.

The statute specifically provides that the defendant may have the advantage of presenting evidence in support of mitigation of the penalty. The statutes proceed to list certain mitigating circumstances, but the list is not inclusive. The defendant is allowed to introduce any evidence that might have a probative force on the issue of sentencing.

The second step of the sentencing procedure is that the court or jury which convicted the defendant must hear the evidence presented at the sentencing hearing. Concerning the purpose of the jury in this situation, the court in ***State v. Dixon, supra,*** stated:

> "They must consider from the facts presented to them--facts in addition to those necessary to prove the cimmission of the crime--whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty." 283 S.2d at 8.

By providing a separate hearing, the jury can make the decision concerning the penalty without the issue of guilt or innocence interfering. They can give their complete and undivided attention to any mitigating circumstances and the defendant has the opportunity to present almost any evidence as to why his crime does not merit the death penalty. The fact that the defendant has merely been convicted of the crime does not demand that his life automatically be taken. The inherent and necessary ingredient

of mercy is allowed to express itself in our judicial system, through our time honored and tested system of a unanimous jury verdict. Since the beginning of our nation our judicial system has entrusted the most complicated and demanding decisions to juries trusting in a panel of the defendant's peers to provide evenhanded justice. By limiting the range of the juries' discretion to hand out the death penalty, Utah's statute insures a disposition of equal justice.

The final step providing safeguards to a defendant is provided by Section 76-3-207(3), which provides that "upon *any* appeal by the defendant where the sentence is of death, the supreme court, if it finds prejudicial error *in the sentencing proceedings only,* may set aside the sentence of death. . . ." (Emphasis added.) This protection insures that, regardless of what theory an appeal is made, the defendant can be sure that the highest court of the state will thoroughly review the sentencing process to ascertain whether that defendant has received every protection guaranteed to him by the law. If the court finds any error is prejudicial to the defendant the sentence of death must be set aside.

Discretion is inherent in the progression of our judicial system, from arrest, arraignment, trial, verdict, and onward through final appeal. Even this Court's "decision to grant or deny certiorari," by law, discretionary and the decision to hear argument on appeal has of necessity also come to depend on an element of discretion." *Goldberg v. Dershowitz, Declaring the Death Penalty Unconstitutional,* 83 Harv. L. Rev. 1773, 1803. Even after the final appeal is finished, complete discretion remains in the ex-

ecutive branch of government to honor or reject a plea for clemency. See U.S. Constitution, Art. II, § 2.

Therefore, it is not discretion per se which is condemned by our Constitution, but arbitrary and unguided discretion that does not produce evenhanded justice. The Utah statute provides controls and guidelines to insure that the penalty of death is given only for the most aggravated and indefensible of crimes.

Regardless of individual opinions concerning capital punishment, there should be a proper recognition of the respective roles of the legislative and judicial branches respecting crime and punishment. In his dissent in *Furman*, Mr. Justice Powell said:

> "The designation of punishments for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies. When asked to encrouch on the legislative preorogative, we are well counseled to proceed with the utmost reticence. The review of legislative choices, in the performance of our duty to enforce the Constitution, has been characterized most appropriately by Mr. Justice Holmes as 'the gravest and most delicate duty that this Court is called on to perform.' " 408 U.S. at 431. (Citation omitted.)

The Utah Legislature has provided a system whereby aggravating and possible mitigating circumstances are defined, but the weighing process and final determinating is left to the carefully scrutinized judgment of jurors and judges. The vital need to allow legislatures to draft reasonable and controlled death penalty statutes was amply expressed by the North Carolina Supreme Court

in *State v. Jarrette*, 284 N.C. 625, 202 S.Ed.2d 721, 747 (1974):

> "Whether the imposition of the death penalty in such a case will be futile in deterring others from like acts is, necessarily, a matter of opinion, upon which reasonable minds may and do differ. The steadily rising tide of crimes of the most serious nature, throughout the nation, has occurred in an era of unprecedented permissiveness in our society and of emphasis on sympathy for the accused rather than for his victim and those endangered by him. This is ample basis for reasonable men to conclude that some punishment of exceptionally vicious crimes, other than imprisonment coupled with careful organized programs for rehabilitation designed to assure the prisoner that he has the sympathy of society, is necessary to bring about the turning of the tide."

CONCLUSION

For the reasons stated above, the judgment should be affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General
State of Utah

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1974

No. 73-7031

JESSE THURMAN FOWLER,
Petitioner,
-vs-
STATE OF NORTH CAROLINA,
Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the United States Supreme Court Rules, 28 U.S.C., the Attorney General of the State of Utah certifies that the following parties at each of the following addresses have been served with the required three copies of the Brief of the Attorney General of the State of Utah, Amicus Curiae: Mr. Jack Greenberg, Mr. James N. Nabrit, III Mr. David Evan Kendall, and Ms. Peggy C. Davis, NAACP Legal Defense and Education Fund, 10 Columbus Circle, New York, New York 10019; Mr. Anthony G. Amsterdam, Stanford University Law School, Stanford, California 94305; Mr. Adam Stein and Mr. Charles L. Beckston, 157 East Rosemary Street, Chapel Hill, North Carolina 27514; and Mr. Jean Benoy, P. O. Box 629, Raleigh, North Carolina 27602; by depositing same in the United States Mail, postage prepaid, this 10th day of January, 1975.

VERNON B. ROMNEY
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State of Utah
236 State Capitol
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MOTION FILED

DEC 17 1975

In the

Supreme Court of the United States

OCTOBER TERM, 1975

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Petitioner,

vs.

NORTH CAROLINA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE

Submitted By

American Ethical Union,
American Friends Service Committee,
Board of Church and Society of the United Methodist Church,
Center for Social Action of the United Church of Christ,
Church of the Brethren,
Commission on Social Action of Reform Judaism:
- Union of American Hebrew Congregations,
- Central Conference of American Rabbis,
- National Federation of Temple Sisterhoods,
- National Federation of Temple Brotherhoods,
- National Federation of Temple Youth,

Division for Mission in North America of the Lutheran Church in America,
National Catholic Conference for Interracial Justice,
National Coalition of American Nuns,
National Council of the Churches of Christ in the U.S.A., Division of Church and Society,
The Leadership Conference of Women's Religious,
The United Presbyterian Church in the United States of America.

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE

The above religious organizations by their attorneys, Elmer Gertz and Willard J. Lassers, move for leave to file a brief *amici curiae* in support of petitioner.

In support of this motion the religious organizations represent as follows:

The legal arguments on behalf of petitioner will be presented by his counsel. There are, however, a number of ethical considerations of deep concern to the religious organizations. Most of these organizations formally have taken stands in opposition to capital punishment.[1]

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[1] The statements appear in the appendix to the amicus brief filed on behalf of the American Friends Service Committee, et al, in *Witherspoon* v. *Illinois*, O.T. 1967, No.

They desire to present a point of view somewhat different from that of petitioner, which they think will contribute to a more complete understanding of the case. Hence, they ask leave to file this brief.

These organizations have a total membership exceeding 26,500,000. They are:

1. AMERICAN ETHICAL UNION

The American Ethical Union is a federation of the Ethical Culture Societies and Fellowships in the United States, which, collectively, constitute a liberal religious humanist fellowship known as the "Ethical Movement" or the "Ethical Culture Movement."

The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. There are today 24 Societies and Fellowships of the American Ethical Union in ten states and the District of Columbia. The American Ethical Union is a member of the International Humanist and Ethical Union, a world-wide organization, with headquarters in Utrecht, The Netherlands. Religious humanists oppose the death penalty. The American Ethical Union has adopted policy statements calling for its abolition, and Members and Leaders (Ministers) of Ethical Culture Societies have been active and, in many instances, in the forefront of original efforts to have the death penalty abolished throughout the United States.

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[1] (Continued)

1015. Substantially every major denomination has expressed its opposition to the death penalty. The statements appear in the *Witherspoon* brief.

2. AMERICAN FRIENDS SERVICE COMMITTEE

The American Friends Service Committee has, since 1917, engaged in religious, charitable, social, philanthropic and relief work on behalf of the several branches and divisions of the Religious Society of Friends in America. There are approximately 123,000 Friends in the United States. The American Friends Service Committee, although it cannot speak for all Friends, has a vital interest in this litigation because of Friends' historic and continued opposition to the taking of human life by the State. Such opposition to capital punishment goes back more than 300 years, to the beginning of the Quaker movement and stems from Quaker belief that there is an element of the divine in every man.

3. BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH

The Board of Church and Society is an instrumentality of the United Methodist Church. Its purpose is to further the works of the church in the sphere of social affairs. The United Methodist Church at its 1960 General Conference adopted a statement opposing the death penalty. The statement was revised in 1964 and is now part of United Methodist Social Policy. The United Methodists number 11,000,000 members among their 38,000 churches which are situated in every state.

4. CENTER FOR SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST

The Center for Social Action is an instrumentality of the United Church of Christ devoted to promoting education and action in international, political and economic affairs. The Center stated its position in opposition to

capital punishment in a policy statement of January 30, 1962. The United Church of Christ has over 2,000,000 adherents.

5. CHURCH OF THE BRETHREN

The Church of the Brethren General Board is the administrative arm of the Church of the Brethren. It carries out policies adopted by the church's legislative arm—Annual Conference—in the areas of world ministries, parish ministries and general services. Among its world ministries are efforts to correct social injustices at home and abroad. The Church of the Brethren has adopted policy statements opposing capital punishment on several occasions, the last one being in 1959 at the Annual Conference. The Church of the Brethren has 200,000 members in approximately 1,000 churches.

6. COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM:

UNION OF AMERICAN HEBREW CONGREGATIONS

CENTRAL CONFERENCE OF AMERICAN RABBIS

NATIONAL FEDERATION OF TEMPLE SISTERHOODS

NATIONAL FEDERATION OF TEMPLE BROTHERHOODS

NATIONAL FEDERATION OF TEMPLE YOUTH

The Commission on Social Action of Reform Judaism is composed of substantially all the Reform Jewish Congregations in the United States, numbering about 700. It is the principal federated coordinating body of American Reform Judaism. It desires to express Judaism's

centuries' old position discouraging the taking of human life by judicial process.

7. DIVISION FOR MISSION IN NORTH AMERICA OF THE LUTHERAN CHURCH IN AMERICA

The Division for Mission is an instrumentality of the Lutheran Church in America. Its object is "to inquire into the nature and proper obedience of the church's ministry within the structures of social life . . . devoting itself in particular to those aspects of the church's ministry in which individual and social needs are met as an expression of Christian responsibility for love and justice."

The 1966 biennial convention of the Lutheran Church in America adopted a social statement on capital punishment encouraging abolition of capital punishment. The Lutheran Church in America has 3,300,000 members in 6,225 congregations in the United States and Canada.

8. NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE

The Conference is largely a lay organization of the Roman Catholic community, devoted to interracial justice. It is a federation of human rights councils and organizations throughout the United States. Founded in 1959, it has approximately 16,000 members, who are representatives of many more Roman Catholics.

9. NATIONAL COALITION OF AMERICAN NUNS

This organization of approximately 2,000 Roman Catholic nuns is dedicated to studying, working, and speaking out on issues related to human rights and social justice. It is the largest organization of its kind.

10. NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., DIVISION OF CHURCH AND SOCIETY

The Department of Church in Society of the Division of Church Life and Work is a part of The United Christian Missionary Society, a national unit of the Christian Church (Disciples of Christ). The Christian Church has approved two resolutions on capital punishment in its International Convention. The first resolution, approved in October 1957 at Cleveland, Ohio, stressed the need for rehabilitation of criminals and indicated that "the practice of capital punishment stands in the way of more creative, redemptive and responsible treatment of crime and criminals. The second, "Concerning Abolition of Capital Punishment," was approved in the October 1962 Assembly of the International Convention at Los Angeles, California. This resolution specifically placed the Christian Church (Disciples of Christ) on record as "favoring a program of rehabilitation for criminal offenders rather than capital punishment."

The Christian Church (Disciples of Christ) in the United States and Canada has a membership of 1,600,648.

12. THE LEADERSHIP CONFERENCE OF WOMEN'S RELIGIONS

This is a conference of all of the major superiors, as they are called, of the Roman Catholic Church in the United States. It is the most prestigious women's group of the Roman Catholic Church and numbers around 800 members, of the topmost echelons of leadership in the Church.

13. THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA

The United Presbyterian Church adopted a statement condemning the death penalty at its 171st general assembly in 1959 and adopted a revised statement at the 177th General Assembly in 1965.

The United Presbyterian Church in the United States of America has a membership of 3,250,000. It has 8,750 churches throughout the nation.

• • •

Petitioner and Respondent have consented to the filing of this brief.

Respectfully submitted,

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December 15, 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

vs.

NORTH CAROLINA,

Respondent.

BRIEF OF AMICI CURIAE

ARGUMENT

A "MANDATORY" DEATH PENALTY VIOLATES THE EIGHTH AMENDMENT

(A) The Judicially Created Mandatory Death Penalty Is Constitutionally Suspect.

In *Furman* v. *Georgia,* 408 U.S. 238 (1972), this Court held that "discretionary" death penalty statutes were unconstitutional. The precise scope and rationale of the decision need not here detain us. Suffice it to say that following *Furman* substantially every condemned prisoner then on death row was re-sentenced to a punishment other than death. None was executed.

At first the Supreme Court of North Carolina joined in a similar course. In at least four cases, decided in 1972, post *Furman,* such action was taken. (See Brief for

Pet., p. 18, n. 17) But then, in *State* v. *Waddell,* the court took quite a different tack. North Carolina had a statute providing death for rape (N.C. Gen. Stat. §14-21) quoted on Petitioner's Brief p. 19, under which the penalty was death, unless, a proviso declared, the jury recommended life, in which case life imprisonment was to be the penalty. This statute as it stood, the Supreme Court of North Carolina held, was unconstitutional under *Furman.* But, rather than simply holding the statute void, the court declared void only the *proviso for mercy* in this statute and a similarly framed statute relating to murder. These statutes, as rewritten, thus became "mandatory" death penalty statutes for the crime of murder, rape and for "carnally knowing and abusing any female child. . . ." The rape statute as rewritten, however, was not to be applied to Waddell himself, the court ruled, but was to be applied only prospectively, from the date of that decision (January 18, 1973).

The events just related merit somber reflection. Their implications are profound. Our law prides itself on its sympathy for, and protection of, the defendant. According to long tradition, if a statute is fairly capable of two constructions, one providing a lesser penalty, and one a greater, the lesser penalty construction is to be favored. The application of this rule and similar rules is so well known it seems superfluous to cite authorities. Yet, in the case at bar the lower court has rejected this principle. Rather than striking down the death clause, it struck down the mercy clause.

This action together with similar action of the Supreme Court of Delaware in *State* v. *Dickerson,* 298 A. 2d 761 (Del. 1972), and by a number of lower courts (See Pet. Br. 21, n. 22), cannot be dismissed simply as an aberration.

Rather, it renders the penalty of death constitutionally suspect. A penalty that induces courts to distort settled humanitarian rules can scarcely be regarded otherwise.

But we are at but the first of the unusual aspects of the case: the court arrogated to itself the power, in effect, to enact a criminal statute—a power unknown to our courts for centuries. The legislature of North Carolina had not decreed that death was to be the invariant penalty for murder or rape. It was the Supreme Court of that state that by a four to three vote so declared. Early in 1974, the North Carolina legislature enacted a "mandatory" statute, but in the interval, 52 persons (Pet. Br. p. 23) were condemned to death under the judge-made *Waddell* rule.

(B) "Mandatory" Death Statutes in Fact are More Invidious Than the Discretionary Statutes Held Void in Furman.

It seems to us that this Court could well rest decision in this case on the constitutional infirmity of a judge-created death statute. But we turn to the broader question of the mandatory death statutes.

Mandatory capital punishment statutes were almost unknown in American law by 1972, having been largely replaced in the late nineteenth century. Their recent revival is unquestionably, indeed admittedly, an attempt to find a way around *Furman.*

There is no constitutional objection to curing defects in state legislation, and enacting statutes that meet standards laid down by this Court. To do so is one matter, to *seem* to do so, by enactments that do not cure the constitutional evil, and actually exacebate the wrong, is quite another. We submit that the so called mandatory

statutes fail to eradicate the evils pointed out in *Furman*. Despite the form of words, the practical consequences, as petitioner points out, and as Professor Black demonstrates, is simply to retain a discretionary system under the guise of a mandatory one. But the mandatory statutes, constitutionally, are more objectionable precisely because the discretion is hidden and therefore need not be articulated, or perhaps even thought of as discretionary decisions by the authorities. A greater evil is the potential weapon it puts in the hands of the prosecutor at plea bargaining time. For the defendant, a trial on the issue of guilt or innocence may well be secured only at the risk not of a discretionary, but of a mandatory, death sentence.

(C) The Facts in this Case Demonstrate that A Mandatory Penalty is Cruel and Unusual.

This case, like every case before this Court, presents a concrete set of circumstances. In the view of amici, these circumstances deserve close scrutiny by this Court, not, as is customary for the purpose of deciding the particular case, but rather for the grave lessons these facts teach about the death penalty.

The facts of the case at bar, set out in Pet. Br. 4-14, demonstrate with an awful clarity that a "mandatory" death penalty is indeed "cruel and unusual punishment" within the prohibition of the Eighth Amendment. Under no sane rule of law on the facts would Jesse Fowler be sentenced to death *mandatorily* for the killing of John Griffin. The men were not enemies but friends, or at least acquaintances. Griffin was contentious. July 1, 1973, was a Sunday. Fowler, Griffiin and others joined in drinking and in a morning dice game. Fowler named Griffin as one who picked up a $10 bill belonging to another player.

Griffin, making an excuse, returned the bill. In the afternoon, Fowler ran into Griffin in a tavern. Griffin berated Fowler over the bill incident. Outside the tavern Griffin knocked Fowler down, bloodied his nose and kicked him. Later Griffin asked one Jones for a pistol.

Griffin and Fowler met a third time that day. Fowler was riding in a car with one Johnny Dolby when Griffin stopped them and began to act in a threatening manner. Dolby and Fowler drove off but then Fowler returned to the scene. The details of the actual shooting related at Pet. Br. 8-10, leave unclear the exact sequence of events. After the shooting, Fowler turned himself in to the police. At the trial he admitted he had been drinking the day of the shooting. He claimed he shot in self-defense. The jury, given a choice of four verdicts, found Fowler guilty of murder.

Amici recite the facts, not because they are unusual, but because in their very "ordinariness" they demonstrate a fundamental truth. At bottom, a mandatory statute is subtly but grossly presumptuous. It is premised on the assumption that man has the wisdom to determine who shall live and who shall die, not as a judgment on a set of circumstances, and a specific defendant, but *a priori*, in terms of a general standard, supposed to cover all manner of men and murders and heedless of specific circumstances, particular defendants and ameliorating circumstances.

The case at bar illustrates the problem. Presumably the jury found that the shooting of Griffin met the North Carolina statutory standard of wilfullness, deliberateness and premeditation and, in consequence, under North Carolina law, Fowler is to die. Let us assume that *absent the death penalty*, the record is sufficient to sustain a murder

conviction and that Fowler needs to be incarcerated for the welfare of society. It does not follow that Fowler merits death. Indeed, it seems safe to say that few would call for Fowler's death for the killing of his drinking and dice playing companion, known to be contentious, and who earlier in the day had attacked him. Yet an inflexible law has decreed death for him. Mandatory statutes will gather within their folds unfortunate wretches doomed to death, not because of the heinousness of their crime, but because the legislature has decreed crimes within a prescribed rubric heinous in general.

The mandatory statutes suffer a graver defect. They presume to deprive a man of life without inquiry into the character of the man and the nature of his act. No one has examined Fowler's life, to ask what sort of person he is, what redeeming qualities he has, what prior offenses he has committed, or even how old he is. Not a single such question has been put, or even under North Carolina law can be put, to determine whether Fowler ought to die. Avenues of inquiry for rational determination are foreclosed. All such questions, under a mandatory scheme, are irrelevant. *Fowler* shows that even discretionary statutes fail the constitutional test. Statutes which abandon rational inquiry, *a fortiori,* we believe, should fall.

Amici advance the foregoing considerations, fully aware that if the penalty were other than death, all that is said above would nonetheless be true and yet society might decide for the protection of others that some persons must be deprived of their liberty for fixed, predetermined periods pursuant to imperfect laws, imperfect judges and imperfect jurors.

But the penalty of death is different. With respect to it, man's ultimate incapacity truly to judge his fellowman

assumes a special significance. The penalty of death stands apart, stark and terrible.

(D) The Death Penalty Has No Place in a Civilized Society.

Finally, these amici address themselves to the death penalty itself, apart from its particular manifestation, apart from the specifics of statutes and the case. For millennia, capital punishment has been the ultimate instrument of punishment. Its victims have numbered untold thousands, frequently drawn from a hated or feared minority. Included have been the young and the old, men and women, black and white, Catholic, Protestant and Jew. Man has devoted his energies to inventing cruelties to inflict on his fellow man. There is scarcely a mode of execution that has not been used: hanging, drawing and quartering, stoning, the gas chamber, the garrote, the guillotine, the sword, the flame, the electric chair, all have been employed. In a more primitive age, we sought openly to inflict death with barbarity. Today we pretend to refinement, priding ourselves that we can inflict death painlessly. Yet, we have but exchanged one horror for another: in place of physical cruelty we substitute an exquisite torment—the months or years that intervene between sentence and execution, while the miserable condemned man alternates between hope and fear, not knowing from stay to stay what his fate will be. Meanwhile, we confine the prisoner in a special section of the prison close by the house of death, deprive him of work, and treat him, still a living human being, as if in a sense, already dead.

However terrible the tortures we inflict on powerless wretches, perhaps more terrible is what we do to ourselves. Today we are appalled at the crimes once thought

worthy of the death penalty. There were hundreds of offenses so punished. At one time the extreme penalty was imposed for adherence to the wrong creed, or even for supposed doctrinal error. But we have our own category of crimes for which we insist a man must forfeit his life. A later age may find our views as wrong as we regard those of a prior age. Yet we, in our hubris, seek to deny a human being of the gift that God alone has given to him—life itself.

Through capital punishment, we cheapen human life and thus demean ourselves. Who are we, frail creatures, subject to hates, enmity, prejudice, passions and fears, to decide which of us is fit to live and which fit to die? Every human endeavor is imperfect, every judge, every juror, every prosecutor, every defense counsel but a mortal man, prone to error. In the very hour when we feel surest of the righteousness of our judgment, we may commit the gravest evil.

The true answer to killing and brutality in our land is not killing and brutality inflicted by the collective—by us as the State. The law is a potent teacher, but the lessons it teaches are not the ones we want learned. If the law teaches death for death, or worse, death for crimes less than death, the law teaches savagery masking in the name of justice.

If this Court turns away from the death penalty, then we may learn to deal rationally with transgressors. To do so undoubtedly will prove extraordinarily difficult. The problem of crime involves a subtle interplay of economic, social, moral and perhaps biological factors. The search will be arduous because we today can no longer accept the simplicities of a by-gone era. But this we can say with confidence: We err sadly if we think that we can

cure, or even ameliorate the problem by putting men to death. Centuries of experience have demonstrated the ineffectiveness of such a course. And if we do put human beings to death, we know who they will be: they will be the poor, the blacks, the friendless, the ignorant, and the forgotten.

If, however, we turn away now, and hopefully forever, from the death penalty, we will have the opportunity to face the real problems of crime. Solutions may be slow in coming. We have to right many ancient injustices. We may have to open the door of opportunity to all. We may have to believe in morally better ways. We may have to practice the precepts of religion.

Only a few days ago, Great Britain, despite the provocation of terrorist attacks refused to reinstate capital punishment. We should follow a similar course.

Answers to the problems of crime may elude us. But if we seek the answer in life, not in death, we will have fulfilled our duty as responsible human beings and, in so doing, will have fulfilled our responsibility to our Creator.

This Court often has served the noble function of being the conscience of our nation. It has not hesitated to grapple with social issues not capable of resolution in any other branch of government and to deal with them in decisive fashion, and by so doing, elevating the moral tone of our country. The case at bar provides a signal opportunity for this Court once again so to act.

CONCLUSION

Over the past decade the major religious organizations of the United States have declared their opposition to the death penalty. Many of these declarations were printed in full text in the brief for the amici religious organizations in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) (Oct. term 1967, No. 1015). Amici, with countless others, believed with *Furman* that the great scourge of the death penalty was lifted forever from America. Tragically, many have chosen to seek ways to thwart that humane decision, and to put back into use the electric chair and the rope and the gas chamber. Presently 361 human beings—the number increases constantly—suffer the agony of death row.

For eight years no one has been put to death in the United States. We have been spared the agony of the frantic last minute appeals for stays and commutations and the ghastliness of executions. We urge this Court to declare that the death penalty no longer has a place in American life.

It is not only Jesse Thurman Fowler that stands at the bar of this Court. It is a barbarism that ought to be banished from our lives. We ask that the death penalty be held offensive to the Constitution.

Respectfully submitted,

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